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In The

Supreme Court of the United States

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COALITION OF CLERGY, LAWYERS & PROFESSORS; Haim Dov Beliac, Robert A. Berger, Kathryn S. Bloomfield, Erwin Chemerinsky, Ramsey Clark, Allen Freehling, Steven Jacobs, Harold S. Lewis, Jr., Hugh R. Manes, Arthur L. Margolis, Kenneth B. Noble, George Regas, Joseph Reichmann, Lawrence W. Schilling, Carol A. Watson, Marion R. Yagman, Stephen Yagman, on behalf of persons held involuntarily at Guantanamo Naval Air Base, Cuba,

Petitioners,

vs.

George Walker BUSH, Donald H. RUMSFELD, Richard B. MYERS, Gordon R. ENGLAND, James L. JONES, Robert A. BUEHN, Michael FAIR, Ellen MUSTAIN, Michael LEHNERT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was it error to affirm the district court's dismissal of the *habeas corpus* petition for lack of standing, in light of the language of 28 U.S.C. 2242, which expressly allows *habeas* petitions to be brought on another's behalf, and in light of the well-established principle that such standing is permitted on behalf of those who lack access to the courts?

2. Did the district court err in dismissing the *habeas* petition for lack of jurisdiction when the custodians of the prisoners, including the President of the United States and the Secretary of Defense, are subject to the jurisdiction of the court?

3. Did the district court have jurisdiction of the *habeas* petition based on *Johnson v. Eisentrager*, 339 U.S. 763 (1950)?

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PETITION FOR WRIT OF CERTIORARI

Coalition of Clergy, Lawyers, and Professors, that consists of Rabbi Haim Dov Beliac, Professor Robert A. Berger, Kathryn S. Bloomfield, Professor Erwin Chemerinsky, Ramsey Clark, Rabbi Allen Freehling, Rabbi Steven Jacobs, Professor Harold S. Lewis, Jr., Hugh R. Manes, Arthur L. Margolis, Professor Kenneth B. Noble, Reverend George Regas, Joseph Reichmann, Lawrence W. Schilling, Carol A. Watson, Marion R. Yagman, and Stephen Yagman, on behalf of persons held involuntarily at Guantanamo Naval Air Base, Cuba, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The district court opinion is reported at 189 F. Supp. 2d 1036 (C.D. Cal. 2002), Appendix B hereof, and the opinion of the Court of Appeals is reported at 310 F.3d 1153 (9th Cir. 2002). Appendix A.

JURISDICTION

The disposition of the Court of Appeals was rendered on November 18, 2002, and this Petition is timely filed within 90 days of the order denying rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

Beginning on or about January 10-11, 2002, the United States government began bringing hundreds of prisoners from Afghanistan to a facility constructed on American territory at Guantanamo Navy Base, Cuba. On January 19, 2002, the Coalition of Clergy, Lawyers, and Professors filed a petition for *habeas corpus* on behalf of the prisoners at Guantanamo, pursuant to 28 U.S.C. 2242, which allows a *habeas* petition to be filed by "someone acting . . . [on] behalf" of a prisoner. The Coalition, as its title implies, is comprised of prominent rabbis, prominent attorneys (including a former Attorney General of the United States), and prominent professors from several disciplines. The Coalition is dedicated to protecting the rights of the prisoners in Guantanamo, whom it believes are being held and treated in violation of the United States Constitution and international laws.

The *habeas* petition filed in the district court alleges that the United States government violated basic principles of international human rights law in forcibly removing prisoners of war from Afghanistan, transporting them to Guantanamo, and holding them indefinitely in small outdoor cages. The petition alleges that the United States government is violating the requirements of both the United States Constitution and treaties binding on the United States by continuing to hold these individuals in Guantanamo without any semblance of due process. The *habeas* petition alleges that the prisoners in Guantanamo have no access to the courts. The detainees' identities have not been disclosed; they have not been provided attorneys; they have no means of filing an action on their own behalf.

The district court dismissed the petition, *Coalition v. Bush*, 189 F. Supp. 2d 1036 (C.D. Cal. 2002), holding that petitioners were without standing and that neither it nor any United States court had jurisdiction of the petition, Appendix A, and the court below affirmed on the standing issue and vacated "the district court's determination that there was no jurisdiction in the Central District of California and its far-reaching ruling that there is no United States court that may entertain any of the habeas claims of any of the detainees." *Coalition v. Bush*, 313 F.3d 1153, 1165 (9th Cir. 2002).

REASONS FOR GRANTING THE PETITION

1. The issues presented in this Petition are of overarching national and international importance.

2. The courts below decided issues contrary to clear statutory language and controlling precedent of this Court.

3. The court below has affirmed an un-American and unprecedented anomaly in America in which persons held involuntarily and incommunicado by the United States of America are prevented from having any access to the courts.

4. High public officers have used and continue to use methods that are alien to our Constitution and international law and treaties and will be permitted to continue to do so without remedy or consequences.

SUMMARY OF ARGUMENT

1. The *habeas* statute expressly grants standing to individuals to bring petitions on behalf of others. Title 28 U.S.C. 2242 states that petitions may be filed "by the person for whose relief it is intended ***or by someone acting in his behalf.***" (Emphasis added.). There are no qualifiers or limits within the statute. The purpose of this provision is to ensure that someone can file a *habeas* petition on behalf of a prisoner who is deprived of access to the courts.

This Court has termed this colloquial "next friend" standing and has found two requirements: an adequate explanation for the reasons the real party in interest cannot appear on her or his own behalf; and the next friend being dedicated to the best interests of the person on whose behalf the petition is brought. *Whitmore v. Arkansas*, 495 U.S. 149, 163-64 (1990). These requirements clearly are met here, as the prisoners in Guantanamo have no access to the courts, and no one has denied that the petitioners in this case are dedicated to protecting their rights. Indeed, the district court recognized that the detainees lack access to the courts, and the government conceded this. *Coalition of Clergy*, 189 F. Supp. 2d at 1042 ("it would be naïve for this court to find that [the detainees] do enjoy . . . access [to court] . . . " "respondents . . . acknowledg[ed] that from a practical point of view the detainees cannot be said to have unimpeded or free access to court.").

The district court dismissed the petition for a lack of standing because of the absence of a close relationship between the petitioners and those being held in Guantanamo.

Ibid. But no such requirement for a close relationship is found in section 2242. Nor has this Court or this court ***ever*** dismissed a *habeas* petition under section 2242 for lack of a close relationship in a situation in which the prisoner lacked access to the courts. In ***every*** case that has dismissed *habeas* petitions on this basis, there were involved only prisoners who had the ability to file their ***own*** *habeas* actions, and who chose not to do so. *See, e.g., Massie ex rel. Kroll v. Woodford,* 244 F.3d 1192, 1194 (9th Cir. 2001) (journalist could not bring a *habeas* action on behalf of a prisoner who could do so for himself).

Moreover, standing is appropriate under the well-established principle that a plaintiff may assert the rights of others who are likely to be unable to litigate for themselves. *Secretary of State v. J.H. Munson Co.,* 467 U.S. 947, 956 (1984); *Eisenstadt v. Baird,* 405 U.S. 438, 446 (1972); *Barrows v. Jackson,* 346 U.S. 249 (1953).

2. The district court also dismissed the petition because it concluded that it "lack[ed] jurisdiction to issue the writ because no custodian is within the territorial jurisdiction of the court." *Coalition of Clergy,* 189 F. Supp. 2d at 1044. This is wrong because this Court has held that a district court has jurisdiction, even over prisoners held elsewhere in the world, "[s]o long as the custodian can be reached by service of process." *Braden v. 30th Judicial Circuit Court of Kentucky,* 410 U.S. 484, 495 (1973).

The custodians of the prisoners at Guantanamo are the respondents in this action, including the President of the United States and the Secretary of Defense. They have minimum contacts with California, and thus are subject to personal jurisdiction there. *See International Shoe Corp. v. State of Washington,* 326 U.S. 310 (1945); *Doe v. Unocal*

Corp., 248 F.3d 913, 922 (9th Cir. 2001) (personal jurisdiction is based on existence of minimum contacts). Moreover, a federal statute, 28 U.S.C. 1391(e), expressly states that "[a] civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority . . . may, except as otherwise provided by law, be brought in any judicial district in which . . . (3) the plaintiff resides if no real property is involved in the action."

Even if the district court was correct as to the lack of personal jurisdiction over the respondents, dismissing the case on this basis was impermissible. Federal statutes and law are clear that a *habeas* petition should be transferred under such circumstances, to a district where jurisdiction exists over the respondents. *See* 28 U.S.C. 1631; *Cruz-Aguilera v. INS*, 245 F.3d 1070, 1073-74 (9th Cir. 2001); *Miller v. Hambrick*, 905 F.2d 259, 262 (9th Cir. 1990).

3. The district court also dismissed the action based on *Johnson v. Eisentrager*, 339 U.S. 763 (1950). *Johnson* involved German soldiers who were captured and tried in China for their actions in Japan during World War II. This Court held that such enemy aliens in a ***declared war***, who never had been in American territory, did not have a right to *habeas corpus*.

The district court erred in relying on *Johnson* for three separate reasons. First, *Johnson* is facially and factually very different from this case. In *Johnson*, this Court repeatedly emphasized that the German nationals ***never had been in an American territory.*** 339 U.S. at 771, 778. But Guantanamo, by the very terms of the United States lease agreement and treaty with Cuba, ***unquestionably is American territory*** and subject to

the sovereign control of the United States. *See* Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 16-23 (1903); Treaty Between the United States of America and Cuba Defining Their Relations, May 29, 1934, 48 Stat. 1682.

Moreover, in *Johnson*, this Court stressed that the prisoners had been accorded a hearing and had access to the courts. 339 U.S. at 780-781. The prisoners in Guantanamo have been accorded no hearing and have no access to any court. Additionally, the Court in *Johnson* relied heavily on the provisions of the Alien Enemy Act of 1798, 1 Stat. 577, *as amended*, 50 U.S.C. 21, to support its conclusion that *habeas* relief need not be provided. But that law, as *Johnson* recognized, applies only when there is ***a declared war***, something which existed then but which does not exist now.

Second, the district court's conclusion that "no court has jurisdiction over the petition," *Coalition of Clergy v. Bush*, 189 F. Supp. 2d at 1046, is inconsistent with many of this Court's cases, which hold that statutes should not be interpreted so as to preclude all federal court jurisdiction. *See, e.g., McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991); *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987); *Johnson v. Robison*, 415 U.S. 361 (1974); *Oestereich v. Selective Service System Local Board No. 14*, 383 U.S. 233 (1968). Indeed, this Court recently, expressly applied this principle to the *habeas corpus* statute. *United States v. St. Cyr*, 121 S.Ct. 2271 (2001).

Third, this Court in *Johnson* went to great lengths to explain that the denial of *habeas* relief to the German prisoners did not violate any treaty or requirements of international law. 339 U.S. at 786-791. Subsequently,

however, in 1992, the United States ratified the International Covenant of Civil and Political Rights, which states: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention." Art. 9(4); 999 U.N.T.S. 171, 176. The *habeas* statute must be interpreted to be in accord with this treaty. *See Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001); *see also Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Chau Han Mow v. United States*, 730 F.2d 1308, 1311 (9th Cir. 1984). Accordingly, *Johnson* is clearly distinguishable because no such treaty existed then, and the law now commands the availability of *habeas* relief.

ARGUMENT

I. PETITIONERS HAVE STANDING BECAUSE THE PRISONERS IN GUANTANAMO LACK ACCESS TO THE COURTS, AND BECAUSE PETITIONERS WILL ADEQUATELY REPRESENT THEIR INTERESTS.

A. The federal *habeas corpus* statute, 28 U.S.C. 2242, expressly allows individuals to bring *habeas corpus* petitions on behalf of others.

The usual rule is that individuals may assert only their own rights in a federal court and cannot present the claims of others. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("the plaintiff generally must assert his own rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."). But this Court repeatedly has held that the ban on third-party standing is prudential, not constitutional. *United Food*

and Commercial Workers v. Brown Group, 517 U.S. 544, 557 (1996); *Warth*, 422 U.S. at 499. As a prudential standing rule, Congress, by statute, can override it and authorize third-party standing. *See, e.g., Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 328 (1999) (Congress has eliminated any prudential concerns by enacting a specific statute that authorizes standing); *Bennett v. Spear*, 520 U.S. 154, 162 (1997) ("unlike their constitutional counterparts, [prudential standing requirements] can be modified or abrogated by Congress"); Laurence Tribe, *American Constitutional Law* 387 (3d ed. 2000) ("Congress may by statute eliminate prudential standing concerns.").

That is exactly what Congress has done in 28 U.S.C. 2242. The statute could not be more clear in authorizing third-party standing; it states that a *habeas* petition can be filed "by the person for whose relief it is intended ***or by someone acting in his behalf.***" (Emphasis added). There are no qualifiers or limits within the statute. Congress' obvious concern was that the government might arrest people and hold them without access to the courts. Unless a *habeas* petition could be brought on their behalf, no relief would be possible and there would be no way to insist that the government follow the law. That result would be absurd. That, of course, is exactly what petitioners allege has occurred here: individuals are being held in an illegal manner without access to any court. That is absurd.

The district court, however, ignored the literal language and plain meaning of the statute and denied standing. The district court concluded that petitioners lacked standing to sue as "next friends" because there is not a close relationship between the petitioners and the individuals

being detained. *Coalition of Clergy v. Bush*, 189 F. Supp. 2d at 1042-43. The court below affirmed on this point. 310 F.3d at 1164.

There are several flaws in this conclusion. First, the statute, section 2242, does *not* contain any such requirement of a close relationship. When statutory language is clear, as it is here in permitting this *habeas* petition, there should be no need for further analysis. *See United States v. Trident Seafoods Corp.*, 92 F.3d 855, 962 (9th Cir. 2000) ("If the statutory language is clear, we need look no further than that language in determining the meaning of the statute."); *Hellon & Assoc., Inc. v. Phoenix Resort Corp.*, 958 F.2d 295, 297 (9th Cir. 1992).

Second, this Court never has interpreted section 2242 as requiring a close relationship. No Supreme Court case ever has held that section 2242 allows *habeas* petitions to be brought on behalf of others only when there is a close relationship between the petitioner and the detained individual. In fact, even this Court's decision relied on by the district court does not state such a requirement. In *Whitmore v. Arkansas*, 495 U.S. 149, 163-164 (1990), this Court articulated the requirements for "next friend" *habeas* standing:

> [f]irst, a next friend must provide an adequate explanation – such as the inaccessibility, mental incompetence, or other disability – why the real party in interest cannot appear on his own behalf to prosecute the action. Second, the next friend must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate and it has been further suggested that a next friend must have some significant relationship with the real party in interest.

In other words, *Whitmore* states just two requirements: (1) an adequate explanation for the reason the real party in interest cannot appear on his own behalf; and (2) the next friend being dedicated to the best interests of the person on whose behalf the petition is brought.

The district court did not deny that these factors are met in this case. The detainees in Guantanamo have no access to the courts; the government conceded this in the hearing in the district court. *Coalition of Clergy v. Bush*, *4 ("counsel for respondents displayed commendable candor in acknowledging that from a practical point of view the detainees cannot be said to have unimpeded or free access to the courts.") So far as is known, the detainees at Guantanamo do not speak English, do not know how to file papers in court, and have not been provided attorneys or the means of access to American courts. A more clear denial of access is hard to imagine. Nor did the district court question that petitioners are "truly dedicated" to the best interests of those being detained.[1]

---

[1] The district court expressed great concern that the petitioners have not communicated directly with those in Guantanamo. *Coalition of Clergy*, 189 F. Supp. 2d at 1043 ("[N]owhere have petitioners alleged, much less filed a declaration that they *attempted* to communicate with the detainees and they were prevented from doing so."). But the district court offered no explanation for how petitioners could do this. Travel by Americans to Cuba is prohibited. Even if petitioners went to Cuba, Guantanamo is closed to the public. There obviously is no chance that petitioners would be allowed access to the detainees. Nor is there any way to communicate with them because their names have not been released. Surely, the failure to communicate directly with the detainees cannot be used to support the government's motion to dismiss when it is the government who is preventing all communication. Immediately after the court below also made mention of this fact, petitioners

(Continued on following page)

Whitmore sets forth two requirements for "next friend" *habeas* standing and these are met here; that should be sufficient for petitioners to have standing. But the district court took the language from *Whitmore*, that it has been "***suggested***" that there be a close relationship, and turned it into a rigid requirement. No decision of this Court ever has held that "next friend" *habeas* standing is to be dismissed for lack of a close relationship if the two requirements stated in *Whitmore* are, as here, in fact met.

Third, no Ninth Circuit case ever has denied next friend *habeas* standing in a situation in which the individuals being held lacked access to the courts. The district court relied on language in *Massie ex rel. Kroll v. Woodford*, 244 F.3d 1192, 1194 (9th Cir. 2001), that "the next friend [have] some close relationship" with the petitioner. But in *Massie* the *habeas* petition was dismissed because the prisoner ***could present his own petition***, if he so desired, in federal court. *Massie* involved a journalist who filed a *habeas* petition on behalf of a man on death row who chose not to challenge his impending execution. This Court stressed that there was no need for next friend standing because the prisoner could bring his own *habeas* petition. This is obviously distinguishable from this situation in which individuals from a foreign nation are being held with no access to lawyers and no access to the courts.

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engaged in the obviously-futile act of attempting to communicate with the detainees by writing a letter to respondent Bush, enclosing with it a letter to be delivered by Bush to the detainees, Appendix C, and asking Bush to deliver the letter to the detainees and advise petitioners that had been accomplished. There was no response from Bush.

Indeed, ***every*** Ninth Circuit case that has rejected "next friend" *habeas* standing involves a situation in which the individual was deemed able to bring the petition for himself or herself. *See, e.g., Brewer v. Lewis*, 989 F.2d 1021 (9th Cir. 1993) (mother lacked standing to bring *habeas* petition for her son because she failed to provide meaningful evidence that her son was incompetent to appear on his own behalf); *Wison v. Dixon*, 256 F.2d 536 (9th Cir. 1958) (*habeas* petition denied because of failure to allege why inmate could not bring his own petition). Thus, the language in *Massie* about the need for a close relationship is merely *obiter dicta* that describes a situation not relevant to that case. Neither respondents nor the district court pointed to a single case in which "next friend" *habeas* standing was denied in which the prisoners lacked access to the courts.

Nor should standing be denied in such an instance. The government and the courts below mistakenly and disparagingly call petitioners "intermeddlers." *Coalition of Clergy v. Bush*, 189 F. Supp. 1042-23; 310 F.3d at 1162. Petitioners would be "intermeddlers" if the detainees at Guantanamo could pursue their own *habeas* petitions and chose not to do so. But since this is not the case here, petitioners are following the letter and spirit of section 2242 in presenting this claim. The courts below are wrong.

B. Traditional principles of third-party standing permit the *habeas corpus* petition here.

Apart from the doctrine of "next friend" *habeas* standing, petitioners have standing in this case based on the well-established rule that third party standing is permitted when an injured person is unlikely to be able to protect

his or her own rights. In *Munson*, 467 U.S. at 956, this Court expressly said that a person may assert the rights of a third party not before the court if there are substantial obstacles to the third party asserting his or her own rights and if there is reason to believe that the advocate will effectively represent the interests of the third party. Pellucidly, these requirements are met here: there are enormous obstacles to the prisoners bringing their own claims and the petitioners will effectively represent the detainees' interests.

Many of this Court's cases have upheld third party standing, absent a close relationship, when the injured individuals realistically could not sue on their own behalf. For example, in *Barrows*, this Court allowed third-party standing and permitted a white individual sued for breaching a racially restrictive covenant to assert the rights of blacks in the community. This Court stated that third-party standing was permitted because "it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court." Because blacks were not parties to the covenant, they had no legal basis for participating in the breach of contract suit. The Court allowed third-party standing without any inquiry as to whether there was a relationship between the litigant and the third parties.

Likewise, in *Eisenstadt*, this Court allowed an individual prosecuted for illegally distributing contraceptives to raise the rights of others to purchase and use birth control devices. The Court justified third-party standing entirely on the inability of those injured to assert their own rights in court. The Court explained: "[U]nmarried persons denied access to contraceptives in Massachusetts . . . are not themselves subject to prosecution and, to that

extent, are denied a forum in which to assert their own rights." *Id.* at 446.

In *Powers v. Ohio*, 499 U.S. 400 (1991), this Court held that criminal defendants have third-party standing to raise the rights of prospective jurors to be free from discrimination in jury selection. Prospective jurors who are struck on the basis of race will not know of the pattern of discriminatory strikes nor are they likely to have an incentive to bring a challenge on their own. This court has held that parties to civil actions have the right third-party standing to raise the rights of prospective jurors to be free from discrimination in jury selection. *Shaw v. Hahn*, 56 F.3d 1128 (9th Cir.), *cert. denied*, 516 U.S. 964 (1995).

All of these cases establish that a litigant may raise the claims of a third party if there is reason to believe that the individual is unlikely to be able to sue for himself or herself. This case clearly fits within this exception. Those detained at Guantanamo have no access to courts. They do not speak the language spoken in our Country or in our courts; there is no court where they are being held; they have no way of filing papers in American courts; they have not been provided attorneys. On this basis alone, third party standing is justified.

II. THE DISTRICT COURT HAD JURISDICTION TO HEAR THE WRIT PETITION BECAUSE THE CUSTODIANS OF THE PRISONERS, THE PRESIDENT AND THE SECRETARY OF DEFENSE, ARE WITHIN THE JURISDICTION OF THE COURT.

The district court also dismissed the *habeas* petition because it said it "lack[ed] jurisdiction to issue the writ

because no custodian is within the territorial jurisdiction of the court." *Coalition of Clergy v. Bush*, *5. This, however, is wrong because the custodians of the detainees in Guantanamo, the respondents in this action, including, George W. Bush and Donald Rumsfeld, are within the jurisdiction of the district court.

The *habeas* statute does not require that the prisoners be held within the territory of the district court where the petition is filed. Rather, this Court has made it clear that the statute requires only that the custodian of the individuals be within a district court's jurisdiction. In *Braden*, 410 U.S. at 495, this Court said that the *habeas* statute "requires nothing more than that the court issuing the writ have jurisdiction over the custodian. So long as the custodian can be reached by service of process, the court can issue a writ 'within its jurisdiction' requiring that the prisoner be brought before the court for a hearing on his claim, or requiring that he be released outright from custody, even if the prisoner himself is confined outside the court's territorial jurisdiction." *See also Tinghitella v. State of California*, 718 F.2d 308, 310 n.2 (9th Cir. 1983) (California district court had jurisdiction over petitioner incarcerated in Texas where a California detainer action placed the prisoner in "constructive custody" of California).

In fact, many cases have allowed *habeas* petitions by those held in military custody outside of the United States. *See, e.g., Ex parte Hayes*, 414 U.S. 1327 (Douglas, Circuit Justice 1973) (permitting a United States Army private to file a *habeas* petition in the District Court for the District of Columbia, despite the fact that the "applicant and his commanding officer [were] located in Germany, outside the territorial jurisdiction of any district court."); *Burns v. Wilson*, 346 U.S. 137 (1953) (district court could hear

habeas petition filed by United States citizens found guilty of rape and murder in Guam, a territory under the supervision of the United States Navy); *Kinnell v. Warner*, 356 F. Supp. 779 (D.Hawaii 1973) (in military context, physical presence of petitioner is not a jurisdictional prerequisite so long as there is territorial jurisdiction over the custodian).

Under *Braden*, the only issue is whether the custodian "can be reached by service of process." The respondents in this case include the President of the United States, George W. Bush; the Secretary of Defense, Donald Rumsfeld; the Chairman of the Joint Chiefs of Staff, Richard B. Myers; and the Secretary of Navy, Gordon R. England. No one in this litigation, not the respondents and not the district court, has denied that these are, from both a practical and a legal perspective, the custodians of these prisoners. The President and the Secretary of Defense ordered the prisoners be brought to Guantanamo and dictated how they were to be held; military officials, such as the Chairman of the Joint Chiefs of Staff and the Secretary of the Navy, are carrying out these orders in holding the prisoners.

Indeed, *Johnson*, the decision relied on by the district court, expressly accepted and assumed that the President and a cabinet official are custodians of prisoners held by the military outside the United States. In *Johnson*, German nationals held by the military in China brought a *habeas* petition and named the President and the Secretary of State, among others, as respondents. This Court, though dismissing the *habeas* petition on other grounds, acknowledged that "while prisoners are in immediate physical custody of an officer or officers not parties to the proceeding, respondents named in the petition [nonetheless had] lawful authority to effect the release." *Id.* at 766-67. Many

other cases support finding the President and the Secretary of Defense here to be custodians of the prisoners because those operating Guantanamo are acting as their agents and following their orders. *See, e.g., Braden*, 410 U.S. at 489 n.4; *Ali v. Gibson*, 572 F.2d 971, 972 n.1, 974 (3d Cir. 1978); *McCoy v. U.S. Board of Parole*, 537 F.2d 962, 966 (8th Cir. 1976).

There can be no doubt that the President and the Secretary of Defense are amenable to service of process in California. They have minimum contacts with the state based on their having systematic and continuous contacts with California. *See International Shoe Corp.*; *Doe* (personal jurisdiction is based on existence of minimum contacts). Moreover, a federal statute, 28 U.S.C. 1391(e) expressly states: "A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority . . . may, except as otherwise provided by law, be brought in any judicial district in which . . . (3) the plaintiff resides if no real property is involved in the action."

The authority relied upon by the district court is clearly distinguishable from this situation. In *Schlanger v. Seamans*, 401 U.S. 487, 490-91 (1971), this Court held that a district court lacked jurisdiction to hear a *habeas* petition because the only custodian of the petitioner was outside the district. But in *Schlanger*, unlike this case, those with custody were not national officials who clearly have minimum contacts with the state where suit was filed and thus are within the jurisdiction of the court.

Nor is *Dunne v. Henman*, 875 F.3d 244 (9th Cir. 1989), on point because it, too, did not involve a situation like this one where the custodians were national officials who

are amenable to suit in any federal district. In fact, in *Dunne*, the court said "the fact that a prisoner is outside the territorial limits [of the court] does not deprive it of subject matter jurisdiction." *Id.* at 246. *Dunne* held that there was not personal jurisdiction in the State of Washington over the warden of a federal penitentiary located in Marion, Illinois. That is quite different from this case where the respondents are national officials, such as the President and the Secretary of Defense. *Dunne* simply says that section 1391(e), by itself, is not enough for personal jurisdiction because there also must be minimum contacts. Such contacts did not exist in *Dunne*, but clearly do in this case.

Finally, and quite significantly, even if the district court were correct that the custodians of the Guantanamo prisoners are not within its jurisdiction, dismissal on this basis was erroneous. Federal law is clear that the case should be transferred to a district, such as the United States District Court for the District of Columbia, where personal jurisdiction over the respondents exists. *See* 28 U.S.C. 1631 ("Whenever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action . . . to any other such court in which the action or appeal could have been brought at the time it was filed or noticed.").

The court below has held specifically that in *habeas* cases there should be transfers to cure jurisdictional defects, *Miller v. Hambrick*, 905 F.2d 259, 262 (9th Cir. 1990), and this Court has said that "[b]ecause the statute's language is mandatory, federal courts should transfer without motion by the parties." *Cruz-Aguilera v. INS*, 245 F.3d 1070, 1073-74 (9th Cir. 2001). Thus, if the district

court were correct about its lack of jurisdiction over the custodians of the prisoners, it should have transferred the case to another district with jurisdiction over the defendants.

III. THE DISTRICT COURT ERRED IN CONCLUDING, BASED ON *JOHNSON V. EISENTRAGER*, THAT NO DISTRICT COURT WOULD HAVE JURISDICTION OVER THIS PETITION. SUCH A CONCLUSION IS ERRNONEOUS.

The district court expressly held that "no district court has jurisdiction over the petition." *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1046. The district court again relied on this Court's decision in *Johnson*. The district court erred for several reasons. First, *Johnson* is clearly distinguishable from the facts and circumstances of this case. Second, the district court's holding that "no district court" has jurisdiction is at odds with numerous of this Court's cases that hold a total preclusion of jurisdiction raises grave constitutional problems, and that therefore federal statutes, including the *habeas* statute, must be interpreted to allow jurisdiction. Third, since the disposition in *Johnson*, the United States has ratified treaties that require the availability of *habeas* to those being held; these treaties did not exist in 1950, and therefore they were not considered in *Johnson*.

A. *Johnson v. Eisentrager* is clearly distinguishable from this case.

In *Johnson*, twenty-one German nationals sought *habeas* relief after they were arrested in China for working in Japan on behalf of the German government. They were

taken into custody by the United States Army and convicted by a United States Military Commission of violating laws of war by engaging in continued military activity in Japan after Germany's surrender, but before Japan had surrendered. The defendants were convicted and repatriated to Germany to serve their sentences in a prison whose custodian was an American army officer. The prisoners sought *habeas* relief in federal court and this Court found that there was no jurisdiction in a federal district to hear the petition.

Here, the district court found that the "Guantanamo detainees are like the petitioners in *Johnson*" and thus held that the petition in this case be dismissed. *Coalition of Clergy v. Bush*, *7. The district court, however, erred because this case is different from *Johnson* in many important respects.

First, in this case, unlike *Johnson*, the prisoners were brought to American territory. This Court in *Johnson* repeatedly emphasized that the prisoners there were never within American "territory." The Court noted that an "alien's presence within its territorial jurisdiction . . . [gives] the Judiciary power to act." 339 U.S. at 771. This Court quoted *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886), as holding that the Constitution's protections apply "to all within the territorial jurisdiction." *Cf.* 42 U.S.C. 1983 (basic civil rights statute applies to all "inhabitants" within the territorial boundaries of the United States). This Court in *Johnson* said that *habeas* relief was not available because "these prisoners at no relevant time were within any territory over which the United States is sovereign." 339 U.S. at 778.

But respondent, by transporting the detainees in this case to Guantanamo, has brought them within the "territorial jurisdiction" of the United States. The Lease Agreement between the United States and Cuba entered into in 1903, and included in a 1934 treaty between these two nations, is clear that ***Guantanamo is under the exclusive control of the United States and is United States territory***. *See* Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 16-23 (1903); Treaty Between the United States of America and Cuba Defining Their Relations, May 29, 1934, 48 Stat. 1682. Article III of the Lease Agreement states:

> While on the one hand the United States recognizes the continuance of ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, ***on the other hand the Republic of Cuba consents that during the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over said area.***

(Emphasis added.)

The district court focused on the phrase "ultimate sovereignty" being in Cuba and concluded that this made *Johnson* controlling. *Coalition of Clergy v. Bush*, at 8. But this was wrong, because the district court misconstrued the meaning of this phrase by viewing it as giving Cuba sovereignty over Guantanamo, while it is under American control. This not only is wrong, but also it balks common sense. The Treaty simply says that ***when the United States relinquishes Guantanamo, sovereignty will revert to Cuba***; it does not mean that Guantanamo now

is under the sovereignty of Cuba. Rather, it is under United States sovereignty: otherwise, what is it the United States would relinquish? There is an excluded middle here. The United States Government's own interpretation of the treaty says exactly this: " 'Ultimate' meaning final or eventual, is a key word here. It is interpreted that ***Cuban sovereignty is interrupted during the period of our occupancy, since we exercise complete jurisdiction and control***, but in case occupation were terminated, the area would revert to the ultimate sovereignty of Cuba." Public Affairs Staff, U.S. Naval Station, Guantanamo Bay, *The History of Guantanamo Bay*, online edition, vol. 1, ch. 3 (www.nsgtmo.navy.mil/gazette/History/hischp3) (emphasis added).

In every possible way, Guantanamo is the territory of the United States and within this Country's sovereign control. Again, the government's own publication concedes this: "It is clear that at Guantanamo Bay we have a Naval reservation, which for all practical purposes, is American territory. Under the foregoing agreements, the United States has for approximately fifty years exercised the essential elements of sovereignty over this territory without actually owning it." *Id.* Cuba obviously could not release the prisoners in Guantanamo; they are entirely under the control of the United States. This, of course, is the very definition of sovereignty. *See, e.g., R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 946 (4th Cir. 1999) ("The sovereign limits of a nation are defined by those territorial boundaries within which it exercises supreme and exclusive power.")

Johnson is clear that those within United States territory are entitled to *habeas* relief. By transporting the prisoners to Guantanamo, the United States brought them

to territory under the United States' sovereign control and thus under the reasoning of *Johnson* itself *habeas* relief must be and is available.

Second, *Johnson* emphasized that the prisoners there had been accorded hearings and due process, something not in any way provided to the prisoners in Guantanamo. In *Johnson*, the prisoners were tried in military courts and given the opportunity to have their *habeas* petitions heard in federal court. This Court noted, "[T]he doors of our courts have not been summarily closed upon these prisoners. Three courts have considered their application and have provided their counsel opportunity to advance every argument in their support and to show some reason why they should not be subject to the usual disabilities of non-resident aliens." 339 U.S. at 780-81.

But the prisoners in Guantanamo have not been accorded any hearing. They are being detained without any semblance of due process as required under the United States Constitution and international law. This is very different from how the prisoners in *Johnson* were treated.

Third, *Johnson* arose in the context of a ***declared war*** and this Court gave that great emphasis in allowing foreign soldiers to be denied *habeas* relief; there is no declared war against Afghanistan or any other nation. This Court, in *Johnson*, invoked the Alien Enemy Act of 1798, 1 Stat. 577, *as amended*, 50 U.S.C. 21, to support its conclusion that *habeas* review need not be provided. But that law applies when there is a ***declared war***. *See* 339 U.S. at 775 ("The resident alien is constitutionally subject to summary arrest, internment, and deportation whenever a 'declared war' exists. Courts will entertain his plea for

freedom from Executive custody only to ascertain the existence of a state of war and whether he is an alien enemy and so subject to the Alien Enemy Act.") Thus, it is very significant that *Johnson*'s holding relies on a statute which requires a declared war, something present in that case, but not this one.

For all of these reasons, *Johnson* is distinguishable from this case and the district court erred by relying on it at all to dismiss this petition.

B. The *habeas corpus* statute must be interpreted so as to not preclude jurisdiction in all federal courts.

The district court concludes that "no court has jurisdiction over the petition." *Coalition of Clergy v. Bush*, *6. In other words, the district court interprets the federal *habeas* statute, based on *Johnson*, as precluding any federal court from hearing a petition from those being held in Guantanamo. But this Court repeatedly has made it clear, especially in the over half century since *Johnson*, that a federal statute which precluded every federal court from exercising jurisdiction would raise grave constitutional problems. Thus, this Court always has gone out of its way to interpret statutes that appear to foreclose all jurisdiction to allow a federal court to hear a matter.

For example, in *Oestereich*, 383 U.S. at 243-44 n.6, the Court interpreted a provision that said that there would be "no judicial review" of Selective Service classifications as not barring review because it "is doubtful whether a person may be deprived of his personal liberty without the prior opportunity to be heard by some tribunal competent fully to adjudicate his claims." Similarly, in *McNary*, this

Court interpreted a law that appeared to preclude judicial review of dispositions of applications for amnesty. The Court said that there is a "well-settled presumption favoring interpretation of statutes [to] allow judicial review" and said that "it is most unlikely that Congress intended to foreclose all forms of meaningful judicial review." *Id.* at 480. *See also Mendoza-Lopez*; *Johnson v. Robison*, 415 U.S. 361 (1974) (narrowly interpreting statutes that precluded jurisdiction so as to allow jurisdiction).

Most recently and most importantly, in *St. Cyr*, this Court interpreted the *habeas* statute to allow those facing deportation to have *habeas* access to the American courts, even though the statutory language appeared to preclude all review including via a writ of *habeas corpus*. This Court stated: "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems."

This Court said that to interpret the *habeas* statute to preclude any petition in any court would raise serious constitutional issues. The Court thus interpreted the law, despite its language to the contrary, to allow those facing deportation to have access to *habeas corpus*. The Court concluded: "A construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to serious constitutional questions." *Id.* at 2279.

The district court's approach interprets the *habeas corpus* statute to preclude all petitions by those held in Guantanamo. This is inconsistent with the large body of

case law holding that statutes must be interpreted to allow some federal court jurisdiction absent a clear statement from Congress to the contrary. No such statement exists here and based on this case law the district court erred in holding that no court could hear this petition.

C. Treaties ratified by the United States require that *habeas corpus* be available to those held in Guantanamo.

In *Johnson*, this Court emphasized that the denial of *habeas* review to the German prisoners did not violate any treaty to which the United States was then a party. 339 U.S. at 786-91. In fact, the Court devoted several pages of its opinion to explaining why the United States' actions were in accord with international law and treaties binding the nation. However, since *Johnson* was decided over 50 years ago, the United States has ratified treaties which require that *habeas* review be available to all held ***by*** the United States.

Specifically, the International Covenant of Civil and Political Rights, ratified by the United States in 1992, states: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention." Art. 9(4); 999 U.N.T.S. 171, 176. Also, the treaty provides that "[n]o one shall be subjected to arbitrary arrest and detention." Art. 9(1), 999 U.N.T.S. 171. The United States approved these provisions without reservation. United States Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights, 31 I.L.M. 645 (January 10, 1992).

The federal *habeas corpus* statute should be interpreted in accord with this Treaty to allow the petition brought in this case. The *habeas corpus* statute specifically authorizes petitions by those who are held in violation of treaties of the United States. 28 U.S.C. 2241(c)(4).

Moreover, the law is clear that federal laws, including the *habeas* statute, must be construed to be in accord with international law. This court below recently spoke of the "well-established Charming Betsy rule of statutory construction which requires that we generally construe Congressional legislation to avoid violating international law." *Ma,* 257 F.3d at 1114; *see also Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Chau Han Mow*, 730 F.2d at 1311. The court below has found in treaties ratified by the United States a "clear international prohibition" against arbitrary and prolonged detention. *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998).

Therefore, in light of the express provisions of Article IX of the International Covenant of Civil and Political Rights, *habeas* review must be available to the prisoners in Guantanamo. No such provision existed at the time of *Johnson* and that makes its analysis and holding inapplicable in this case.

CONCLUSION

The district court reached a pre-determined conclusion and then interpreted the law, attempting to reason backwards, to support its erroneous conclusion, and the court below affirmed on standing and vacated on jurisdiction findings. In all this there was significant error.

For all the foregoing reasons this Court should grant certiorari.

Respectfully submitted,

YAGMAN & YAGMAN & REICHMANN & BLOOMFIELD
STEPHEN YAGMAN
Counsel of Record

February 3, 2003

APPENDIX A

310 F.3d 1153

United States Court of Appeals,

COALITION OF CLERGY, LAWYERS, AND PROFESSORS; Haim Dov Beliak; Robert A. Berger; Kathryn S. Bloomfield; Erwin Chemerinsky; Ramsey Clark; Allen Freehling; Steven Jacobs; Harold S. Lewis, Jr.; Hugh R. Manes; Arthur L. Margolis; Kenneth B. Noble; George Regas; Joseph Reichman; Lawrence W. Schilling; Carol A. Watson; Marion R. Yagman; Stephen Yagman, on behalf of persons held involuntarily at Guantanamo Naval Air Base, Cuba, Petitioners-Appellants,

v.

George Walker BUSH; Donald H. Rumsfeld; Richard B. Myers; Gordon R. England; James L. Jones; Robert A. Buehn; Michael Fair; Ellen Mustain; Michael Lehnert, Respondents-Appellees.

No. 02-55367.

Argued and Submitted July 8, 2002.
Filed Nov. 18, 2002.

Stephen Yagman, Marion R. Yagman, Joseph Reichmann, Kathryn S. Bloomfield, Yagman & Yagman & Reichmann & Bloomfield, Venice Beach, CA, Erwin Chemerinsky, University of Southern California Law School, Los Angeles, CA, for the appellants.

Robert D. McCallum, Jr., Assistant Attorney General; John S. Gordon, United States Attorney; Paul D. Clement, Deputy Solicitor General; Gregory G. Katsas, Deputy Assistant Attorney General; Robert Loeb, Sharon Swingle, United States Department of Justice, Washington, D.C., for the appellees.

Jay Alan Sekulow, Stuart J. Roth, Robert W. Ash, Virginia Beach, VA, for the amicus.

Appeal from the United States District Court for the Central District of California, A. Howard Matz, District Judge, Presiding. D.C. No. CV-02-00570-AHM.

Before NOONAN, WARDLAW and BERZON, Circuit Judges.

OPINION

WARDLAW, Circuit Judge:

A Coalition[1] of clergy, lawyers, and law professors petitioned for a writ of habeas corpus on behalf of persons captured in Afghanistan by the Armed Forces of the United States and now held at Guantanamo Naval Base, Cuba, in a secure detention facility known as Camp X-Ray. The Coalition alleged that the detainees have been deprived of their liberty without due process of law, have not been informed of the nature and cause of the accusations against them or afforded the assistance of counsel, and are being held by the United States government in violation of the United States Constitution and the Third Geneva Convention.

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[1] The members of the Coalition include: Rabbi Haim Dov Beliak, Prof. Robert A. Berger, Kathryn S. Bloomfield, Esq., Prof. Erwin Chemerinsky, Ramsey Clark, Esq., Rabbi Allen Freehling, Rabbi Steven Jacobs, Prof. Harold S. Lewis, Jr., Hugh R. Manes, Esq., Arthur L. Margolis, Esq., Prof. Kenneth B. Noble, Rev. George Regas, Joseph Reichman, Esq., Lawrence W. Schilling, Esq., Carol A. Watson, Esq., Marion R. Yagman, Esq., and Stephen Yagman, Esq.

The district court dismissed the petition on the grounds that: (1) the Coalition lacked next-friend standing to assert claims on behalf of the detainees; (2) the district court itself lacked jurisdiction to issue the writ; and (3) no federal court could have jurisdiction over the writ, so there is no basis to transfer the petition to another federal district court. *Coalition of Clergy v. Bush,* 189 F.Supp.2d 1036, 1039 (C.D.Cal.2002). The Coalition timely appealed.

Because we agree that the Coalition lacks next-friend and third-party standing to bring a habeas petition on behalf of the detainees, we hold that the district court lacked jurisdiction to decide that neither it nor any other United States federal court may properly entertain the habeas claims in this petition. We therefore affirm the district court's holding as to standing, but reverse and vacate that portion of the decision that purports to adjudicate the rights of the detainees or persons on their behalf to petition before other United States courts.

I. Background

In an event forever seared upon the soul of America, members of the Al Qaeda terrorist group engaged in a quick series of attacks upon the United States on September 11, 2001, killing thousands of civilians in New York, northern Virginia, and Pennsylvania, with the intent to work even more crippling damage upon the country. As the horror of these events was realized by the American people, the President and Congress united in their commitment of the Armed Forces of the United States to take military action against the Al Qaeda terrorists and those who would harbor them, like the Taliban government of Afghanistan, to prevent any future acts of international

terrorism. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) (authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons"). American forces were sent to Afghanistan and neighboring countries, and a United States-led alliance attacked the forces of the Taliban government and Al Qaeda.

The United States and its allies successfully removed the Taliban from power and captured, killed, or drove to flight some of the more notorious members of Al Qaeda and the Taliban. Kabul, the capital of Afghanistan, was taken on November 13, 2001, and thousands of Taliban and Al Qaeda combatants were eventually captured or surrendered. Among these captives, the detainees deemed most dangerous by the United States military were transferred to the United States Naval Base at Guantanamo Bay, Cuba.

The detainees are being held at the naval base in a secure facility known as Camp X-Ray. They have been visited by members of the International Red Cross and diplomats from their home countries. Although the detainees have not been allowed to meet with lawyers, they have had some opportunity to write to friends and family members.

The district court had jurisdiction over the habeas petition under 28 U.S.C. § 2241. This court has jurisdiction to review the district court's final order over the habeas petition under 28 U.S.C. § 1291. We review a district court's dismissal of a habeas petition de novo.

Jiminez v. Rice, 276 F.3d 478, 481 (9th Cir.2001); *Edelbacher v. Calderon,* 160 F.3d 582, 583 (9th Cir.1998).

II. Discussion

This case stands or falls on whether the Coalition has standing to bring a habeas petition on behalf of the Guantanamo Bay detainees. Standing, as a general matter, raises both constitutional and prudential concerns incident to the exercise of jurisdiction. At its constitutional core, standing is a manifestation of the Article III case-or-controversy requirement; it is the determination of whether a specific person is the proper party to invoke the power of a federal court. As the United States Supreme Court has stated, "[i]n essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin,* 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). The Coalition does not assert direct standing, but instead urges us to find next-friend standing under the federal habeas statute or standing under traditional principles of third-party standing. We address these arguments in turn.

A. Next-friend standing under 28 U.S.C. § 2242.

The federal habeas statute provides that the "[a]pplication for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended *or by someone acting in his behalf.*" 28 U.S.C. § 2242 (emphasis added). Congress added the words "or by someone acting in his behalf" by amendment in 1948. Even before the amendment, however, federal courts had

long recognized that under appropriate circumstances, habeas petitions could be brought by third parties, such as family members or agents, on behalf of a prisoner. This species of third-party habeas standing, known as next-friend standing, was examined at length by the Supreme Court in *Whitmore v. Arkansas,* 495 U.S. 149, 161-64, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990). In *Whitmore,* the Supreme Court recognized that next-friend standing "has long been an accepted basis for jurisdiction in certain circumstances." The Court explained:

> Most frequently, "next friends" appear in court on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek relief themselves. As early as the 17th century, the English Habeas Corpus Act of 1679 authorized complaints to be filed by "any one on . . . behalf" of detained persons, and in 1704 the House of Lords resolved "[T]hat every Englishman, who is imprisoned by any authority whatsoever, has an undoubted right, by his agents, or friends, to apply for, and obtain a Writ of Habeas Corpus, in order to procure his liberty by due course of law." Some early decisions in this country interpreted ambiguous provisions of the federal habeas corpus statute to allow "next friend" standing in connection with petitions for writs of habeas corpus, and Congress eventually codified the doctrine explicitly in 1948.

Whitmore, 495 U.S. at 162-63, 110 S.Ct. 1717 (citations and footnotes omitted).

The actual practice codified by Congress as to which persons could properly bring a petition was not without its limitations. An examination of the pre-amendment cases demonstrates consistently that each time next-friend

habeas standing was granted by a federal court, there was a significant pre-existing relationship between the prisoner and the putative next friend. For example, in 1869, a wife of an enlisted soldier was granted next-friend habeas standing to bring a petition on behalf of her husband. *In re Ferrens,* 8 F. Cas. 1158 (S.D.N.Y.1869) (No. 4746). Similarly, in *United States ex rel. Funaro v. Watchorn,* the Circuit Court for the Southern District of New York considered a habeas petition signed not by the detainee, but by the detainee's attorney. *United States ex rel. Funaro v. Watchorn,* 164 F. 152, 153 (C.C.S.D.N.Y.1908). The court noted that the attorney was permitted to sign the habeas petition on behalf of his client, explaining the general practice and its rationale:

> Notwithstanding the language of [the statute], it has been the frequent practice in this district to present habeas corpus petitions in deportation cases signed and verified by others than the person detained. In such cases, often for lack of time, as well as because of infancy or incompetency, it would be impossible to present a petition signed and verified by the person detained. . . .

Id.

In a similar vein, the District Court for the Northern District of Ohio recognized the general practice allowing next friend standing, and permitted a brother-in-law to bring a petition on behalf of a minor under 21:

> This application is made on [the prisoner's] behalf by . . . his brother-in-law. It is proper practice to make an application by one on behalf of another. . . . An application may be made by a parent or guardian having a superior right to the

> custody and control of the person illegally detained, when such person might not himself obtain relief.

Ex parte Dostal, 243 F. 664, 668 (N.D.Ohio 1917). The Second Circuit Court of Appeals further elaborated upon the practice and its limitations in 1921:

> It has never been understood that, at common law, authority from a person unlawfully imprisoned or deprived of his liberty was necessary to warrant the issuing of a habeas corpus, to inquire into the cause of his detention . . . . But the complaint must set forth some reason or explanation satisfactory to the court showing why the detained person does not sign and verify the complaint and who "the next friend" is. It was not intended that the writ of habeas corpus should be availed of, as matter of course, by intruders or uninvited meddlers, styling themselves next friends.

United States ex rel. Bryant v. Houston, 273 F. 915, 916 (2d Cir.1921); *see also Rosenberg v. United States,* 346 U.S. 273, 291-92, 73 S.Ct. 1152, 97 L.Ed. 1607 (1953) (denying stranger the right to bring petition on behalf of the Rosenbergs, because there was no authorization); *United States ex rel. Toth v. Quarles,* 350 U.S. 11, 13 n. 3, 76 S.Ct. 1, 100 L.Ed. 8 (1955) (granting next-friend standing to sister on behalf of prisoner in Korea); *Gilmore v. Utah,* 429 U.S. 1012, 1013-14, 97 S.Ct. 436, 50 L.Ed.2d 632 (1976) (recognizing, for purposes of stay, next-friend standing of mother on behalf of prisoner); *Evans v. Bennett,* 440 U.S. 1301, 99 S.Ct. 1481, 59 L.Ed.2d 756 (1979) (Rehnquist, Circuit Justice) (recognizing, for purposes of stay, next-friend standing of mother on behalf of prisoner); *Hamilton v. Texas,* 485 U.S. 1042, 1042, 108 S.Ct. 1761, 100 L.Ed.2d

187 (1988) (recognizing next-friend standing of mother on behalf of prisoner); *Demosthenes v. Baal,* 495 U.S. 731, 735, 110 S.Ct. 2223, 109 L.Ed.2d 762 (1990) (denying next-friend standing to parents on behalf of prisoner, when there was no showing of mental incompetence); *Vargas v. Lambert,* 159 F.3d 1161, 1163 (9th Cir.1998) (granting next-friend standing to mother on behalf of prisoner); *Hamdi v. Rumsfeld,* 296 F.3d 278, 281 (4th Cir.2002) (granting next-friend standing to father on behalf of son) ("*Hamdi II*").

The practice of allowing next-friend standing also had been long recognized in our Circuit before it was enacted into the habeas statute. In 1928, we considered an application for a writ of habeas corpus that was not signed by the person in custody, but was "made on behalf and at the request of [the prisoner]." *Collins v. Traeger,* 27 F.2d 842, 843 (9th Cir.1928). On appeal, the state argued that the application, signed by someone other than the person in custody, was defective. We saw the defect, if any, as merely procedural, and since no previous objection had been made, the issue was not preserved for appeal. *Id.* But we also explained that, under the circumstances, it was implied that the "petition may be made and verified by a person authorized to act on behalf of the one restrained of his liberty." *Id.* Moreover, such a position was "supported . . . by the weight of authority." *Id.* (citing *Bryant,* 273 F. at 916; *Dostal,* 243 F. at 668; *Watchorn,* 164 F. at 153).

The Supreme Court surveyed the development of the next-friend doctrine in *Whitmore,* both at common law and under the federal habeas statute, concluding:

> "[N]ext friend" standing is by no means granted automatically to whomever seeks to pursue an action on behalf of another. Decisions applying

> the habeas corpus statute have adhered to at least two firmly rooted prerequisites for "next friend" standing. First, a "next friend" must provide an adequate explanation – such as inaccessibility, mental incompetence, or other disability – why the real party in interest cannot appear on his own behalf to prosecute the action. Second, the "next friend" must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate, and it has been further suggested that a "next friend" must have some significant relationship with the real party in interest. The burden is on the "next friend" clearly to establish the propriety of his status and thereby justify the jurisdiction of the court.

Whitmore, 495 U.S. at 163-64, 110 S.Ct. 1717 (citations omitted).

We have subsequently described the two-pronged *Whitmore* inquiry as follows:

> In order to establish next-friend standing, the putative next friend must show: (1) that the petitioner is unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability; and (2) the next friend has some significant relationship with, and is truly dedicated to the best interests of, the petitioner.

Massie ex rel. Kroll v. Woodford, 244 F.3d 1192, 1194 (9th Cir.2001).

We first examine whether the Guantanamo Bay detainees are able to litigate their own cause, and then turn to an examination of whether the Coalition has a

relationship with any of the detainees sufficient to meet the second prong of *Whitmore-Massie.*

i. Detainees' inability to litigate own cause.

The first prong of the *Whitmore-Massie* test, lack of access to the court, has most often been considered a question of mental capacity, usually in the context of an inmate's capacity to bring his own petition. *See, e.g., Massie,* 244 F.3d 1192; *Vargas,* 159 F.3d 1161. In *Whitmore,* the Supreme Court noted:

> [O]ne necessary condition for "next friend" standing in federal court is a showing by the proposed "next friend" that the real party in interest is unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability. That pre-requisite for "next friend" standing is not satisfied where . . . his access to court is otherwise unimpeded.

Whitmore, 495 U.S. at 165, 110 S.Ct. 1717.

The Coalition does not urge that the detainees suffer a mental or physical disability precluding their representation of their interests before the court, rather it argues that the first prong of the *Whitmore-Massie* test is satisfied because the detainees "appear to be held incommunicado," and thus are physically blocked from the courts. This hyperbolic argument fails because it lacks support in

the record; in fact, the prisoners are not being held incommunicado.[2]

The record shows that the detainees have been visited by members of the International Red Cross and diplomats from their home countries, and have had limited opportunities to write to friends and family members. Family members have filed habeas petitions on the behalf of some detainees, and diplomats from several countries including Pakistan, Kuwait, Australia, and the United Kingdom have made inquiries into the status of the detainees and sought their release. *Rasul v. Bush,* 215 F.Supp.2d 55, 57 (D.D.C.2002) ("[T]he Court would point out that the notion that these aliens could be held incommunicado from the rest of the world would appear to be inaccurate."); *see also Hamdi II,* 296 F.3d at 279 (Father filed a petition for a writ of habeas corpus as next friend of his son, who is detained at the Norfolk Naval Station Brig as an alleged enemy combatant captured during ongoing military operations in Afghanistan.). As noted by the District Court for the District of Columbia, "the government recognizes that these aliens fall within the protections of certain provisions of international law and that diplomatic channels remain an ongoing and viable means to address the

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[2] The Coalition requested at oral argument that we remand for an evidentiary hearing on a variety of issues, including the detainees' lack of access to lawyers or courts. We deny this request because the Coalition has not even made a preliminary showing that upon remand it could prove, in light of the record that is before the court, that any individual detainee is being held totally incommunicado. A bald assertion that the detainees are held incommunicado, when the record makes clear the contrary, does not necessitate a hearing; indeed it appears such a hearing would be futile.

claims raised by these aliens." *Rasul,* 215 F.Supp.2d at 56-57.

Nevertheless, it is evident that the detainees are being held in a secure facility in an isolated area of the world, on a United States Naval Base in a foreign country, to which United States citizens are severely restricted from traveling. The detainees are not able to meet with lawyers, and have been denied access to file petitions in United States courts on their own behalf. As stated by the district court, and conceded by the Government at argument, "from a practical point of view the detainees cannot be said to have unimpeded or free access to court." *Coalition of Clergy,* 189 F.Supp.2d at 1042. We need not delineate the contours of the access requirement in these circumstances, however, in light of the Coalition's lack of a relationship with the detainees.

ii. Significant relationship with and true dedication to the detainees.

Turning to the second prong of *Whitmore-Massie,* we examine whether the members of the Coalition have some significant relationship with, and are truly dedicated to the best interests of, the detainees. In *Whitmore,* the Supreme Court addressed the limitations on third-party "next friend" standing, and explained that "[h]owever friendly" and "sympathetic" a petition may be, and however concerned the petitioner is that "unconstitutional laws [are being] enforced," a petitioner without a significant relationship does not suffer a sufficient grievance for standing purposes. *Whitmore,* 495 U.S. at 166, 110 S.Ct. 1717. Otherwise, "however worthy and high minded the motives of 'next friends' may be, they inevitably run the

risk of making the actual defendant a pawn to be manipulated on a chessboard larger than his own case." *Lenhard v. Wolff,* 443 U.S. 1306, 1312, 100 S.Ct. 3, 61 L.Ed.2d 885 (1979) (Rehnquist, Circuit Justice). As the *Whitmore* Court explained:

> These limitations on the "next friend" doctrine are driven by the recognition that it was not intended that the writ of habeas corpus should be availed of, as matter of course, by intruders or uninvited meddlers, styling themselves next friends. Indeed, if there were no restriction on "next friend" standing in federal courts, the litigant asserting only a generalized interest in constitutional governance could circumvent the jurisdictional limits of Art. III simply by assuming the mantle of "next friend."

Whitmore, 495 U.S. at 164, 110 S.Ct. 1717 (citations and internal quotation marks omitted).

The Coalition argues that the Supreme Court in *Whitmore* did not impose the requirement of a "significant relationship" between the "next friend" and the detainee, but only noted that the cases it had surveyed suggested as much. In its view, the "significant relationship" requirement is the Ninth Circuit's own erroneous gloss on *Whitmore,* which need not be followed.[3] All that is necessary, according to the Coalition, is: (1) an adequate explanation

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[3] Even if the Coalition were correct, we are constrained to adhere to our circuit's prior precedent, and the appropriate mechanism to revisit this framework would be through the en banc process. *United States v. Ramirez-Cortez,* 213 F.3d 1149, 1156 (9th Cir.2000). However, as explained below, *Massie's* restatement of the *Whitmore* standard is not merely a gloss, but flows directly from the Court's rationale.

for the reason the real party in interest cannot appear on its own behalf; and (2) the true dedication by the next friend to the best interests of the detainee. The "significant relationship" criterion is no more than an additional consideration in determining whether a petitioner is a suitable next friend. *See, e.g., United States v. Ken Int'l. Co.,* 897 F.Supp. 462, 465 (D.Nev.1995) (stating the two requirements, and then noting: "It is also suggested that a 'next friend' must have some significant relationship with the real party in interest." (citing *Whitmore,* 495 U.S. at 163-64, 110 S.Ct. 1717)).

Combining the "significant relationship" requirement, however, with the "dedicated to best interests" consideration, as we did in *Massie* (and as suggested by *Whitmore*), meets the concerns the *Whitmore* Court addressed. The existence of a significant relationship enhances the probability that a petitioner is a suitable next friend, *i.e.,* that a petitioner knows and is dedicated to the prisoner's individual best interests. The more attenuated the relationship between petitioner and prisoner, the less likely a petitioner can know the best interests of the prisoner. The Fourth Circuit adopted the *Massie* approach in its recent decision in *Hamdi v. Rumsfeld,* 294 F.3d 598 (4th Cir.2002) ("*Hamdi I*"), denying next-friend standing to a public defender and a private citizen who filed habeas petitions on behalf of a military detainee captured as an alleged enemy combatant in Afghanistan. *Id.* at 604. Construing the language of *Whitmore,* it noted:

> [The Supreme Court in *Whitmore*] thought it important to begin by stating that there are "*at least two* firmly rooted prerequisites for 'next friend' standing," thereby suggesting that there may be more. And after specifying the first two

> requirements, the Court went out of its way to observe that "it has been further suggested that a 'next friend' must have some significant relationship with the real party in interest." (denying minister and first cousin of prisoner next friend standing).

Hamdi I, 294 F.3d at 604 (quoting *Whitmore,* 495 U.S. at 163-64, 110 S.Ct. 1717) (citations omitted and emphasis in original). Following *Massie,* "*Whitmore* is thus most faithfully understood as requiring a would-be next friend to have a significant relationship with the real party in interest." *Id.*

Nevertheless, the contours of the requisite "significant relationship" do not remain static, but must necessarily adapt to the circumstances facing each individual detainee. "Significance" is a relative concept, dependent on the individual prisoner's plight. Not all detainees may have a relative, friend, or even a diplomatic delegation able or willing to act on their behalf. In such an extreme case it is plausible that a person with "some" relationship conveying some modicum of authority or consent, "significant" in comparison to the detainee's other relationships, could serve as the next friend. Moreover, the concept of "true dedication" is a subjective one, difficult of measurement. The existence of some relationship, whether it be from authorized representation to friendship or alliance to familial, serves as an objective basis for discerning the "intruder" or "uninvited meddler" from the true "next friend."

In this case, however, the Coalition has not demonstrated any relationship with the detainees. The record is devoid of any effort to even communicate with the detainees. Certainly the absence of any connection or association

by the Coalition with any detainee is insufficient even under an elastic construction of the significant relationship requirement to confer standing. Although there may be some extreme circumstances necessitating relaxation of the *Whitmore-Massie* standard, the record in this case is devoid of such circumstances. We therefore reserve consideration of these hypothetical cases for another day. *See Hamdi I,* 294 F.3d at 604.

iii. The Coalition lacks next-friend standing.

We accept the Coalition's concern for the rights and welfare of the detainees at Camp X-Ray as genuine and sincere. Nevertheless, it has failed to demonstrate any relationship with the detainees, generally or individually. We therefore must conclude that even assuming the detainees are unable to litigate on their own behalf and even under the most relative interpretation of the "significant relationship" requirement the Coalition lacks next-friend standing. As the district court aptly stated:

> To permit petitioners to seek a writ of habeas corpus on a record devoid of any evidence that they have sought authorization to do so, much less obtained implied authority to do so, would violate the second prong of the *Whitmore-Massie* test. And it would invite well-meaning proponents of numerous assorted "causes" to bring lawsuits on behalf of unwitting strangers.

Coalition of Clergy, 189 F.Supp.2d at 1044. Having demonstrated no relationship either as to any individual detainee or to the detainees *en masse,* the efficacy of the Coalition's representation is in serious doubt. At best, the Coalition can only assert "a generalized interest in

constitutional governance." *Whitmore,* 495 U.S. at 164, 110 S.Ct. 1717. This relationship is insufficient to support next-friend standing.

B. Third-party standing.

It is a well-established rule that a litigant may assert only his own legal rights and interests and cannot rest a claim to relief on the legal rights or interests of third parties. *Singleton v. Wulff,* 428 U.S. 106, 113-14, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976); *Warth,* 422 U.S. at 499, 95 S.Ct. 2197. As the prohibition against third-party standing is prudential, rather than constitutional, the Supreme Court has recognized exceptions to this general rule. For example, in *Powers v. Ohio,* 499 U.S. 400, 410-11, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), which upheld a litigant's third-party standing to raise equal protection claims of jurors peremptorily challenged due to race, the Supreme Court recognized three requirements for would-be third-party petitioners.

> We have recognized the right of litigants to bring actions on behalf of third parties, provided three important criteria are satisfied: The litigant must have suffered an "injury in fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests.

Id. (citations omitted); see also *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *Shaw v. Hahn,* 56 F.3d 1128, 1130 n. 3 (9th Cir.1995) (third party must have suffered an injury-in-fact) (citing *Singleton,* 428 U.S. at 112-16, 96 S.Ct. 2868).

Of the three requirements for third-party standing: (1) injury-in-fact; (2) close relationship to the third party; and (3) hindrance to the third party; the Coalition addresses only the last. It contends that a litigant may raise the claims of a third party if there is reason to believe that the individual is unlikely to be able to sue for himself or herself.

Even if we were to assume satisfaction of the third requirement, a hindrance to the detainees' ability to assert their own claims, we would nevertheless conclude that the Coalition lacks third-party standing because neither it nor its members can demonstrate either the first requirement of an injury-in-fact or the second requirement of a close relationship. As to the first, the Coalition makes no allegation of personal injury to its members, and as to the second, it has alleged no relationship to the detainees. As in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485-86, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982), the members of the Coalition:

> fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms.

Id. Because neither the Coalition nor any of its members has a relationship with the detainees, it cannot assert third-party standing on their behalf. Absent injury-in-fact and any relationship to the detainees, we find no third-party standing.

C. Jurisdiction.

Because we conclude that the Coalition lacks standing, we decline to reach the remaining questions addressed by the district court: (1) whether the district court lacked jurisdiction because no custodian is within its territorial jurisdiction; and (2) whether the Supreme Court's decision in *Johnson v. Eisentrager,* 339 U.S. 763, 70 S.Ct. 936, 94 L.Ed. 1255 (1950) would preclude any district court from asserting jurisdiction over the petition.[4] We therefore vacate those portions of the district court's opinion which reached those questions.

Reaching either question, in particular the applicability of *Johnson,* is inappropriate. Such determinations purport to adjudicate the habeas rights of individual detainees, when the Coalition itself lacks standing to bring the petition and they were not before the court. The Supreme Court has stated that federal courts must hesitate before

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[4] There is no question that the holding in *Johnson* represents a formidable obstacle to the rights of the detainees at Camp X-Ray to the writ of habeas corpus; it is impossible to ignore, as the case well matches the extraordinary circumstances here. After Germany had surrendered in World War II, German spies were captured by allied forces in China. They were tried and convicted by a military tribunal, imprisoned in Germany and sought a writ of habeas corpus in the United States federal courts. *Johnson,* 339 U.S. at 766, 70 S.Ct. 936. The German spies were thus enemy aliens who were captured and tried abroad, and imprisoned there by the United States military. The Supreme Court held that the privilege of the writ of habeas corpus could not be extended to aliens held outside the sovereign territory of the United States. *Id.* at 778, 70 S.Ct. 936; *see also Zadvydas v. Davis,* 533 U.S. 678, 693, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.").

resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation. *Singleton,* 428 U.S. at 113-14, 96 S.Ct. 2868. Such a concern cuts to the heart of the case-and-controversy requirement of Article III. Courts should not adjudicate rights unnecessarily; the real parties in interest in an adversarial system are usually the best proponents of their own rights. *Id.* Well-established principles of judicial restraint favor resolving this appeal on the narrow standing ground. The Supreme Court has warned, where litigants lack standing, that "[f]or a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 101-02, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

III. Conclusion

The question before us is not the scope of the rights and privileges of the detainees themselves under either our Constitution or other international laws or agreements. Here, we consider only the rights of the members of the Coalition to assert standing on behalf of the detainees and to seek habeas review of their detention. Because the Coalition failed to demonstrate any relationship with any of the detainees, it lacks next-friend or third-party standing to bring a habeas petition on their behalf. We therefore affirm the district court's order as to the lack of standing.

We also vacate the district court's determination that there was no jurisdiction in the Central District of California and its far-reaching ruling that there is no United States court that may entertain any of the habeas claims

of any of the detainees. The district court was without jurisdiction to hold that the constitutionally embedded right of habeas corpus was suspended for all Guantanamo Bay detainees, without regard for their particular circumstances, whether they petitioned individually or through a true next friend on their behalf. The judgment of the district court is therefore

AFFIRMED in part, VACATED in part.

The court orders each side to bear its own costs. Judge Noonan, dissenting from this order, believes costs should be awarded in favor of the government.

BERZON, Circuit Judge, concurring:

> I agree with the result reached in the court's opinion. I write separately because I do not believe that we need to address whether next friend standing always requires a significant relationship. If we did need to address that question, I would be inclined to hold that a significant relationship is not always necessary.

I.

The Supreme Court's decision in *Whitmore v. Arkansas*, 495 U.S. 149, 163-64, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) adopted two requirements: (1) that the petitioner is unable to litigate his own cause; and (2) that the next friend be "truly dedicated" to the best interests of the person on whose behalf he seeks to litigate. Although the Supreme Court noted that "it has been *suggested* that a 'next friend' must have some significant relationship with the real party in interest," *id.* (emphasis added), the Court, notably, did not choose to adopt this suggestion,

adhering instead to the two-pronged test. *See also Sanchez-Velasco v. Dept. of Corrections,* 287 F.3d 1015, 1026 (11th Cir.2002), *cert. denied* 525 U.S. 811, 119 S.Ct. 42, 142 L.Ed.2d 33 (1998) ("significant relationship" may not be an "independent requirement"); *but see Hamdi v. Rumsfeld,* 294 F.3d 598, 604 (4th Cir.2002) ("*Hamdi I*") (concluding that a significant relationship is an "important requirement").

This Court appeared to import the significant relationship requirement into *Whitmore's* second prong in *Massie ex rel. Kroll v. Woodford,* 244 F.3d 1192, 1194 (9th Cir.2001). *Massie* summarized *Whitmore* as follows:

> In order to establish next friend standing, the putative next friend must show: (1) that the petitioner is unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability; and (2) the next friend has some significant relationship with, and is truly dedicated to the best interests of, the petitioner. *See Whitmore,* 495 U.S. at 163-65, 110 S.Ct. 1717.

Massie's summary of *Whitmore* was incorrect. As noted, the Supreme Court in *Whitmore* did not indicate that a "significant relationship" was part of the second *Whitmore* prong. Rather, only after stating the two-prong *Whitmore* test did the Court add "it has been *suggested* that a 'next friend' must have some significant relationship with the real party in interest." *Whitmore,* 495 U.S. at 164, 110 S.Ct. 1717 (emphasis added).

After the summarizing language quoted above, the *Massie* opinion never discussed the second *Whitmore* prong again. Instead, Massie denied next friend standing solely because the petitioners in that case failed to meet

the first *Whitmore* prong. *Id.* at 1199 n. 3. Absolutely nothing in *Massie* turned on the resolution of the significant relationship issue pointedly left open in *Whitmore*.

The above-quoted language in *Massie*, then, was simply dicta, on any view of that concept: It was unaccompanied by any analysis whatsoever of the issue left open in *Whitmore* regarding the necessity of a significant relationship and was in no way relevant to any holding in *Massie*. As dicta, it does not bind a panel of this court. *See e.g. Inlandboatmens Union of Pac. v. Dutra Group*, 279 F.3d 1075, 1081 (9th Cir.2002) (panel not bound by dicta from prior cases); *United States v. Johnson*, 256 F.3d 895, 915 (9th Cir.2001) (Kozinski, J., concurring) (defining dicta narrowly, but recognizing that "a statement [ ] made casually and without analysis" as a "prelude to another legal issue that commands the panel's full attention" is dicta if the later panel is convinced that the earlier panel did not "make a deliberate decision to adopt the rule of law it announced.")

I therefore do not agree that we are bound by *Massie's* reading of *Whitmore*. Instead, I would address the role of a significant relationship in the next friend doctrine afresh.

II.

Doing so, I conclude that, like *Massie*, this case does not require us to decide whether the significant relationship requirement is an independent requirement or merely one way of satisfying the second *Whitmore* prong. *Compare Sanchez-Velasco*, 287 F.3d at 1026-1027 (significant relationship is probative, but may not be required) *with Hamdi I*, 294 F.3d at 604 (significant relationship required). Under either analysis, Coalition lacks next friend

standing. Though Coalition's concern for the detainees of Camp X-Ray is surely genuine and sincere, Coalition has not sufficiently demonstrated that it is positioned so as to provide assurance that it will best advance the detainees' interests.

First, Coalition has failed to demonstrate *any* relationship with the detainees which would provide assurance that its interests were appropriately aligned with the detainees'. Such relationships might include that of blood relative, friend, present or past fiduciary agent, or any other relevant relationship.[1] *See, e.g., Hamdi v. Rumsfeld,* 296 F.3d 278, 281 (4th Cir.2002) (*"Hamdi II"*) (granting next friend standing to father on behalf of son); *Ford v. Haley,* 195 F.3d 603, 624 (11th Cir.1999) (attorney with history of representing a client has next friend standing if client is determined to be incompetent).

Not only has the Coalition failed to demonstrate any such relationship,[2] the Coalition has not otherwise demonstrated

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[1] The related context of third-party standing recognizes a wide range of relationships in which the third-parties' interests are sufficiently aligned with the interests of the rights-holder that standing is appropriate. *See e.g. U.S. Dept. of Labor v. Triplett,* 494 U.S. 715, 720-21, 110 S.Ct. 1428, 108 L.Ed.2d 701 (1990) (lawyer-client); *Carey v. Population Serv. Int'l,* 431 U.S. 678, 682, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1978) (vendor-customer); *Singleton v. Wulff,* 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) (doctor-patient); *Pierce v. Society of Sisters,* 268 U.S. 510, 536, 45 S.Ct. 571, 69 L.Ed. 1070 (school- students). In the proper context these are the sorts of relationships that could support next friend standing. I would not limit the pertinent relationships to agency or consent relationships.

[2] At best, Coalition could assert the relationship of a potential lawyer to a potential client. In some circumstances, such a relationship might create third party standing. *See* note 3, *infra.* I cannot conclude on the particular facts of this case, however, that next friend standing

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compliance with *Whitmore's* second prong. In particular, the record is devoid of any Coalition effort even to communicate with the detainees. *See Sanchez-Velasco,* 287 F.3d at 1026-27 (where attorney had no prior relationship with client, fact that attorney did not even attempt contact before filing petition suggested that interests were not aligned). Although actual contact may be unnecessary if, for example, prisoners are being held incommunicado, the complete lack of any *attempt* to communicate counsels against next friend standing. *Id.*

Further, the Coalition, while it asserts an interest in the detainees' welfare, is an ad-hoc, self-appointed group. An institution with an established history of concern for the rights of individuals in the detainees' circumstances – such as the Red Cross or Amnesty International – would be more likely to be able to show that it is truly dedicated to the best interest of the detainees than a group without that history and with more broad ranging interests and background.

III.

As the majority recognizes, the requisite alignment of interests must adapt to the circumstances facing each individual detainee. Not all detainees have a relative, friend, prior attorney, or other suitable person to act on their behalf. In the extreme case, where there is no next friend under traditional criteria, the showing required to

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on this basis is appropriate, especially in light of the Coalition's failure to try to contact the detainees. *Accord Sanchez-Velasco,* 287 F.3d at 1026-27.

meet *Whitmore's* second prong should be relaxed, to the degree that no relationship should be required if none is practically possible. *See Hamdi I,* 294 F.3d at 604 n. 3.

Coalition has argued that this was such a situation. Some detainees, however, have pursued legal action on their own behalf or through family members. *See e.g. Rasul v. Bush,* 215 F.Supp.2d 55 (D.D.C.2002) (habeas petition brought by citizens of Australia and United Kingdom; injunction requested by twelve Kuwaiti nationals and their family members). Coalition responds by noting that legal action has only ensued on behalf of Australian, English and Kuwaiti detainees, and suggests that people from those countries, independently or with the help of their government, are likely to have the money and sophistication to investigate and bring legal claims in the United States. These lawsuits, Coalition argues, do not indicate that the other prisoners, such as the Afghani and Pakistani detainees, have access to suitable next friends.

On a different record, this contention might have merit. Here, however, Coalition has not proven except by assertion that the remaining detainees have no relationship with anyone who could appropriately serve to litigate the legality of the detention.[3]

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[3] I note that in some instances plaintiffs such as those here may be able to establish standing on their own behalf. It is plausible, for example, that the inability of the lawyer-plaintiffs to represent as clients the Guantanamo detainees when they wished to do so (whether for a fee or otherwise) created an injury-in-fact sufficient under Article III for standing purposes. *Cf. Dept. of Labor v. Triplett,* 494 U.S. 715, 720-21, 110 S.Ct. 1428, 108 L.Ed.2d 701 (1990) (lawyer injured by fee-limitation statute had standing to assert the "due process right to

(Continued on following page)

Indeed, at least with respect to the complicated threshold jurisdictional issues presented by this case, the detainees' interests *are* being currently litigated in our nation's courts by other detainees and their families. *See, e.g., Rasul,* 215 F.Supp.2d at 57. Presumably, fellow detainees are "truly dedicated" to the interests of the detainees as a group, at least with regard to those common threshold issues, because the interests of the various detainees are identical with regard to those issues. So Coalition, which has not established any nexus or relationship with the detainees, is not as well situated to litigate these common issues as are the detainees who have managed to access our courts. While those detainees are not purporting directly to represent the interests of fellow detainees, they are doing so as a practical matter with regard to the initial jurisdictional issues, and have every incentive to do so well. Although we do not ordinarily permit such virtual representation as a substitute for direct representation of an individual, *see Richards v. Jefferson County,* 517 U.S. 793, 797-803, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996), here *any* representation will be "virtual" in the sense that the injured individual will not himself have direction or control of the litigation. Where that is the case – and it is likely to be the case where plaintiffs seek next friend standing but have no cognizable relationship to the detainees – the fact that the pertinent legal issues are being litigated in other suits by individuals with interests identical as to those issues with those of the detainees becomes, for me, decisive. Were the courts to

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obtain legal representation" of his clients). Coalition does not allege such an injury.

decide in favor of jurisdiction in those cases and the interests of the various detainees on the merits issues then to diverge, the possibility that non-related next friends (using "related" in the broad sense I have posited) might be able to establish standing could be addressed anew.

I stress that the difference between my position and that of the majority is relatively narrow. The majority recognizes that the significant relationship requirement must be a flexible one. I would go a bit further and leave open the possibility that *no* prior relationship is necessary if (1) the plaintiffs make an affirmative and convincing demonstration of their dedication to the detainees' best interests, including a showing that they have made a reasonable effort to establish a relationship if none exists; and (2) the plaintiffs also show that the circumstances entirely preclude both the appearance as next friend of anyone with any relationship to the detainees as well as the practical representation of the detainees' interests in court by others similarly situated.

The distinction between my understanding of the next friend doctrine and that of the majority could matter in another case. It does not matter in this one. I therefore concur.

APPENDIX B

189 F.Supp.2d 1036

United States District Court,
C.D. California.

COALITION OF CLERGY, et al., Petitioners,
v.
George Walker BUSH, et al., Respondents.

No. CV 02-570 AHM (JTLX).

Feb. 21, 2002.

Stephen Yagman, *Kathryn S. Bloomfield*, *Joseph Reichmann*, Yagman & Yagman & Reichmann & Bloomfield, Venice Beach, CA, Erwin Chemerinsky, Los Angeles, CA, for petitioners.

John S. Gordon, United States Attorney, Ronald L. Cheng, Lawrence Ng, Becky Walker, Douglas A. Axel, Los Angeles, CA, Paul Clement, Deputy Solicitor General, *Alice S. Fisher*, Deputy Asst. Attorney General, Washington, D.C., for respondents.

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS AND FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS

MATZ, District Judge.

I.

PROCEDURAL BACKGROUND AND SUMMARY OF RULING

This case results from the sudden attacks on the United States on September 11, 2001, resulting in the deaths of thousands of innocent civilians. Within a few

days, the President, with the approval of Congress (Pub.L. No. 107-40 (September 8, 2001)), commanded the Armed Forces of the United States to use all necessary and appropriate force against the persons responsible for those attacks, who soon came to be known as the "Al Qaeda terrorist network." The President dispatched American forces to Afghanistan, where that group was believed to be functioning with the active support of the "Taliban" government then in power in that country. In the course of combat operations, American forces, as well as other nations allied with the United States, captured or secured the surrender of thousands of persons. Beginning in early January 2002, the Armed Forces transferred scores of these captives to the United States Naval Base at Guantanamo Bay, Cuba ("Guantanamo"). Their confinement in Guantanamo led to this action.

Petitioners are a group referring to themselves as the "Coalition of Clergy, Lawyers, and Professors." They include at least two journalists; ten lawyers; three rabbis; and a Christian pastor. Some of these individuals are prominent professors at distinguished law schools or schools of journalism. One is a former Attorney-General of the United States. On January 20, 2002 they filed a Verified Petition for Writ of Habeas Corpus on behalf of "Persons Held Involuntarily at Guantanamo Naval Air Base, Cuba." In substance, the petition alleges that the captives held at Guantanamo (the "detainees") are in custody in violation of the Constitution or the laws or treaties of the United States, in that they: (1) have been deprived of their liberty without due process of law, (2) have not been informed of the nature and cause of the accusations against them and (3) have not been afforded the assistance of counsel. The petition also suggests,

somewhat elliptically, that the detainees have rights under the Geneva Convention that have been violated, such as "prohibition of [*sic*] transferring persons taken prisoner in [*sic*] war from the country of their capture." (Pet.Memo.7:16-17)

Petitioners allege that "[b]ecause the persons for whom relief is sought appear to be held incommunicado and have been denied access to legal counsel, application properly is made by petitioners acting on their behalf. 28 U.S.C. § 2242. . . . " (*Id.* 7:20-23)

The relief that petitioners seek is a writ or order to show cause (1) directing the respondents to "identify by full name and country of domicile and all other identifying information in their possession each person held by them within three days;" (2) directing respondents "to show the true cause(s) of the detention of each person;" and (3) directing respondents to produce the detainees at a hearing in this court. (*Id.* 8:14-23; 9:1-3)

The persons named as respondents are President George W. Bush; Secretary of Defense Donald H. Rumsfeld; Richard B. Myers, the Chairman of the Joint Chiefs of Staff; Gordon R. England, the Secretary of Navy; and five other named individuals and "1000 Unknown Named United States Military Personnel," all of whom are alleged to be military officers responsible for the operations at the Guantanamo Naval Base.

On January 22, 2002, two days after the petition was filed, the Court presided over a brief hearing at which it expressed strong doubts that it has jurisdiction to entertain

the petition. The Court ordered the parties to address that threshold question in written briefs. They have done so and appeared at a second hearing today.[1]

Having reviewed and considered all the arguments and conducted additional research on its own, the Court rules as follows:

1. Petitioners do not have standing to assert claims on behalf of the detainees.

2. Even if petitioners did have standing, this court lacks jurisdiction to entertain those claims.

3. No federal court would have jurisdiction over petitioners' claims, so there is no basis to transfer this matter to another federal district court.

4. The petition must be dismissed.

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[1] On February 11, 2002, after the parties had filed their respective briefs on the threshold jurisdictional issues, petitioners filed a "First Amended" petition purporting to add a claim under what they refer to as the "cruel and unusual clause" of the Eighth Amendment. Counsel for petitioners had acknowledged at the hearing "I'm going to have to proceed on the petition as it is right now. And if a decision is reached to add an Eighth Amendment claim, then I'm going to have to ask for permission to do that." He neither sought nor received permission. Moreover, the court instructed the parties that "if there is jurisdiction the petition could be amended at a later time." (Tr., p. 10-11) The Amended Petition does not affect, much less cure, the jurisdictional defects described below, and this Order applies to both petitions.

II.

THE WRIT OF HABEAS CORPUS

Given the importance of the issues that petitioners proclaim are at stake in this case, a decidedly abbreviated description of the writ of habeas corpus is appropriate.

> The writ of habeas corpus, providing a means by which the legal authority under which a person is detained can be challenged, is of immemorial antiquity . . . The precise origin of the writ . . . is not certain, but as early as 1220 A.D. the words "*habeas corpora*" are to be found in an order directing an English sheriff to produce parties to a trespass action before the Court of Common pleas. . . . Today it is regarded as "perhaps the most important writ known to the constitutional law of England . . . . "
>
> Its significance in the United States has been no less great. Article I, ¶ 9 of the Constitution gives assurance that the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it, and its use by the federal courts was authorized [as long ago as in] . . . the Judiciary Act of 1789.

Wright, Miller and Cooper, Federal Practice and Procedure: Jurisdiction 2D § 4261 and n. 3 (citations omitted).

The statutory authorization for a federal judge to issue a writ of habeas corpus currently is set forth in 28 U.S.C. § 2241, *et seq.* In essence, when a judge issues such a writ, the authorities responsible for the petitioner's custody are required to demonstrate that he is being detained lawfully. As Mr. Justice Black put it, the "grand

purpose" of the writ of habeas corpus is "the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones v. Cunningham,* 371 U.S. 236, 243, 83 S.Ct. 373, 377, 9 L.Ed.2d 285 (1963).[2]

Although the writ of habeas corpus plays a central role in American jurisprudence, there are many limitations on a court's authority to issue such a writ. Here, in urging the court to dismiss the petition – i.e., effectively refuse to issue a writ – respondents invoke three such limitations. They contend: (1) petitioners lack "standing" to come to this court – i.e., they are not entitled to ask the court on the detainees' behalf to order respondents to justify the detention of the detainees; (2) this particular federal court lacks jurisdiction to entertain the petition; and (3) no federal district court anywhere has jurisdiction. Respondents are correct as to all three contentions.

III.

PETITIONERS DO NOT HAVE STANDING

Respondents argue that petitioners lack standing to assert claims on behalf of the detainees. Whether a plaintiff (or, in the case of a habeas proceeding, a petitioner) has standing "is the threshold question in every federal case, determining the power of the court to entertain the suit. . . . The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining

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[2] The foregoing discussion involves only the writ of habeas corpus "ad subjiciendum," which compels an inquiry into the cause of restraint. There are other writs of habeas corpus, but they are irrelevant here.

party, even though the court's judgment may benefit others collaterally. . . . " *Warth v. Seldin,* 422 U.S. 490, 498-499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975).

28 U.S.C. § 2242 provides that "[a]pplication for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended *or by someone acting in his behalf.*" (Emphasis added). Courts use the term "next friend" to describe the person who acts on behalf of another person (the "real party in interest") for whom the relief is sought. The "next friend" has the burden "clearly to establish the propriety of his status and thereby justify the jurisdiction of the court." *Whitmore v. Arkansas,* 495 U.S. 149, 110 S.Ct. 1717, 1727, 109 L.Ed.2d 135 (1990).

A number of courts have allowed habeas petitions to be filed by "next friends," although in circumstances different from those here. *See, e.g., U.S. ex rel. Toth v. Quarles,* 350 U.S. 11, 76 S.Ct. 1, 100 L.Ed. 8 (1955) (sister, on behalf of ex-serviceman civilian who was arrested by military authorities and taken to Korea to stand trial before a court-martial); *Vargas v. Lambert,* 159 F.3d 1161 (9th Cir.1998) (mother of state court prisoner slated to be executed for murder, where mother made showing sufficient to establish her son's lack of mental competence to waive his right of appeal); *Nash v. MacArthur,* 184 F.2d 606 (D.C.Cir.1950) (attorney, on behalf of seven Japanese nationals convicted of war crimes by military commissions).

In seeking dismissal of this petition on the basis that petitioners lack "next friend" standing, respondents rely primarily on *Whitmore v. Arkansas, supra.* In *Whitmore,* the named petitioner was a death row inmate. He sought

to intervene in an Arkansas state court criminal proceeding in order to prosecute an appeal on behalf of one Simmons, who had been convicted of multiple murders and had waived his right to direct appeal. Whitmore tried to get permission to appeal on behalf of Simmons on the basis that the heinous facts in Simmons's cases would become included in a database that Arkansas uses for purposes of comparative reviews of capital sentences. Whitmore contended that inclusion of the information about Simmons would make him – Whitmore – appear less deserving of execution. Whitmore also purported to proceed as "next friend" of Simmons, hoping to overturn the latter's death sentence on appeal. Although Whitmore was not seeking a writ of habeas corpus on behalf of Simmons, the Supreme Court analogized his effort to that of a "next friend" in a habeas case, and defined the prerequisites for "next friend" standing.

> First, a "next friend" must provide an adequate explanation – such as inaccessibility, mental incompetence, or other disability – why the real party in interest cannot appear on his own behalf to prosecute the action. . . . [Citation]. Second, the "next friend" must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate. . . . [Citation]. [It also] has been further suggested that a "next friend" must have some significant relationship with the real party in interest.

Id. at 162-64, 110 S.Ct. 1717 (citations omitted). The Court then held that Whitmore lacked standing because "there was no meaningful evidence that [Simmons] was suffering from a mental disease, disorder or defect that substantially affected his capacity to make an intelligent decision." *Id.* at 166, 110 S.Ct. 1717.

The Ninth Circuit has stated that under the *Whitmore* test, "[i]n order to establish next friend standing, the putative next friend must show (1) that the petitioner is unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability; and (2) the next friend has some significant relationship with, and is truly dedicated to the best interests of, petitioner." *Massie ex rel. Kroll v. Woodford,* 244 F.3d 1192, 1194 (9th Cir.2001). The court will now address this two-prong test.

A. *Lack of Access to the Court.*

Whitmore and the other cases on which respondents rely are all factually distinguishable because the real party in interest clearly *did* have access to the court, could have filed a petition in his own behalf and chose not to do so. Thus, in *Brewer v. Lewis,* 989 F.2d 1021 (9th Cir.1993), the person denied standing to seek a writ of habeas corpus was a condemned prisoner's mother. Her son had explicitly sought to abandon all further judicial proceedings, and the mother was unable to establish that he was incompetent. *Id.* at 1025-1026. Similarly, in *Massie* a death row inmate filed a federal habeas corpus petition but then moved to dismiss it. A journalist who had dealt with the inmate for fifteen years thereupon filed a "next friend" petition on behalf of the inmate. Like the mother in *Brewer* and the "next friend" in *Whitmore,* the journalist failed to present "meaningful evidence" of the inmate's alleged incompetency to dismiss his own habeas corpus petition. Moreover, at oral argument before the Ninth Circuit, the inmate explicitly opposed the journalist's petition. *Id.* at 1195. Not

surprisingly, the Court found that the journalist lacked standing. *Id.* at 1199.[3]

Here, although the hastily-prepared petition is far from a model of precision or clarity, it does at least allege that the Guantanamo detainees "appear to be held incommunicado and have been denied access to legal counsel. . . ." Pet. Memo. 7:20-23. This is tantamount to alleging lack of access to the court. But standing alone, conclusory allegations such as these are not sufficient to establish standing. *Brewer,* 989 F.2d at 1026; *Massie,* 244 F.3d at 1197 ("meaningful evidence" required; "conclusory opinions" are insufficient). In this case, petitioners' assertions that the detainees are totally incommunicado are not supported by the news articles they attached to the petition. Indeed, as respondents point out, the news articles actually contradict the assertions. Some of the articles reflect that the detainees were given the opportunity to write to friends or relatives (Pet.Mem. p. 10); others state that some detainees had already been in contact with diplomats from their home countries (Pet.Mem. pp. 16:20-21); yet other articles state that a team from the International Red Cross met with the detainees (Pet.Mem. p. 15). In their brief filed a week after respondents' brief, petitioners did not explain these inconsistencies, much less

[3] Compare *Groseclose v. Dutton,* 594 F.Supp. 949 (M.D.Tenn.1984), where next friends, including a death row inmate, minister and two anti-death penalty organizations, were permitted to proceed. There, the real party in interest did not oppose their efforts and the petitioners demonstrated that his previous waiver of the right to file a habeas petition was involuntary. *Groseclose,* 594 F.Supp. at 951, 961-62.

provide a basis for the court to disregard them.[4] Moreover, the Court has been informed that on February 19, 2002, the parents of three specified Guantanamo detainees did file suit on behalf of their respective sons. *Shafiq Rasul, et al. v. Bush,* No. 02-CV 00299 (D., D.C.) *See,* "Suit Says U.S. Violates Prisoners Rights in Cuba," Wall Street Journal, February 20, 2002, at A10.

Respondents are correct that as to the first prong of the *Whitmore-Massie* test, the immediate question before this court is the adequacy of the allegations in the petition concerning lack of access to court. They are also correct that the allegations fail to satisfy that prong. But in court today, counsel for respondents displayed commendable candor in acknowledging that from a practical point of view the detainees cannot be said to have unimpeded or free access to court. Despite the recent filing of a second lawsuit, it would be naive for this court to find that they do enjoy such access. Thus, although it makes no actual finding on the issue, the court will proceed to analyze the second prong under the supposition that the detainees lack access to court.

B. *Significant Relationship With The Detainees or "Uninvited Meddlers."*

The second prong of the *Whitmore-Massie* "next friend" test requires the petitioners to demonstrate that they have a "significant relationship" with the detainees.

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[4] The Court may take judicial notice of the information in the articles attached to the petition. Fed.R.Evid. 201(b). Indeed, both sides cite these articles for different purposes.

Respondents argue that petitioners cannot demonstrate that they are dedicated to the best interests of the Guantanamo detainees because they have not demonstrated such a relationship. On the question of what constitutes a significant relationship, respondents cite *Davis v. Austin,* 492 F.Supp. 273 (N.D.Ga.1980), in which a distant relative and a minister were not permitted to proceed on behalf of a death row inmate. But in *Davis* the real party in interest explicitly made a competent decision to forego further proceedings. It was because the "next friends" were proceeding *contrary* to the inmate's wishes that the court found they lacked standing – not because their ties were too remote. *Id.* at 275-276.

Respondents also cite *Lenhard v. Wolff,* 443 U.S. 1306, 100 S.Ct. 3, 61 L.Ed.2d 885 (1979), in arguing that petitioners fail to demonstrate a significant relationship with the detainees. In *Lenhard,* then-Justice Rehnquist granted a stay of a prisoner's execution on an application filed by two deputy public defenders who had been appointed by the trial court. In *dicta,* Justice Rehnquist noted that "however worthy and high minded the motives of 'next friends' may be, they inevitably run the risk of making the actual defendant a pawn to be manipulated on a chessboard larger than his own case." *Id.* at 1312, 100 S.Ct. 3. However, in *Lenhard,* the lawyers' right to petition on behalf of the inmate was not in question. Indeed, Justice Rehnquist lauded them for their "commendable fidelity to their assignment. . . . " *Id.* at 1308, 100 S.Ct. 3. Moreover, he stated,

> [I]t strikes me that from a purely technical standpoint a public defender may appear as "next friend" with as much justification as the mother of [the real party in interest]. . . .

Id. at 1310, 100 S.Ct. 3.

Although *Davis* and *Lenhard* are weak authority for respondents, *Whitmore, supra,* does buttress their contention that petitioners lack standing, particularly this language:

> [L]imitations on the "next friend" doctrine are driven by the recognition that it was not intended that the writ of habeas corpus should be availed of, as a matter of course, by intruders or uninvited meddlers, styling themselves next friends. . . . Indeed, if there were no restriction on "next friend" standing in federal courts, the litigant asserting only a generalized interest in constitutional governance could circumvent the jurisdictional limits of Art. III simply by assuming the mantle of "next friend."

Whitmore, 495 U.S. at 163, 110 S.Ct. 1717.

The court recognizes that the named petitioners have filed this petition because they perceive there are rights that need to be vindicated. But that consideration, standing alone, does not necessarily make them "uninvited meddlers" within the meaning of *Whitmore.*[5] *See Warren v.*

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[5] In using the term "uninvited meddlers" in *Whitmore,* Chief Justice Rehnquist cited to *United States ex rel. Bryant v. Houston,* 273 F. 915, 916 (2d Cir.1921). There, the named petitioner failed to disclose anywhere in her petition who she was, what relationship, if any, she had with the real party in interest or whether the real party was unable to file the petition himself. Chief Justice Rehnquist also cited to *Rosenberg v. United States,* 346 U.S. 273, 291-292, 73 S.Ct. 1152, 1161-1162, 97 L.Ed. 1607 (1953). There, the real parties in interest already had several attorneys but their habeas petition was prepared by another lawyer who sought to intervene. Justice Frankfurter noted that the legitimate counsel of record "simply had been elbowed out of the control of their case" by the lawyer who filed the habeas petition. *Id.*

Cardwell, 621 F.2d 319, 321 n. 1 (9th Cir.1980) (California lawyer who filed a petition in his own name on behalf of an Arizona inmate not accessible because of a prison lockdown "was not an uninvited meddler"). There is a difference between being "uninvited because you are meant to be excluded" and being "uninvited but welcome." The next friend/would-be petitioners in the cases upon which respondents rely fall into the former category, because their efforts were at odds with the desires of the real parties on whose behalf they were attempting to proceed. That is not the case here, because there is no evidence that the Guantanamo detainees affirmatively object to the petitioners' efforts, and common sense suggests that they would not.[6] But neither is there evidence that they are welcome, so petitioners cannot demonstrate that they fall into the latter category.

More than four weeks have elapsed since petitioners filed the original petition. In that period, petitioners' counsel has filed a brief on jurisdiction, an amended petition and numerous other memoranda and declarations on other issues. During that same period, the names of at least some of the detainees have been published by the national press and, as indicated above, parents of three specified detainees have filed suit. Yet there is nothing in the record even suggesting that *any* of the Guantanamo detainees supports this petition. Not one friend, relative, diplomatic or religious representative, fellow countryman or anyone with a direct tie to a particular detainee has

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[6] As Justice Frankfurter stated in a different context, "Nor does law lag behind common sense." *Ludecke v. Watkins,* 335 U.S. 160, 167, 68 S.Ct. 1429, 1432, 92 L.Ed. 1881 (1948).

authorized this petition. Common sense suggests that something is seriously awry in petitioners' claims to be the appropriate representatives of the detainees. This conclusion is reinforced by yet another telling factor: nowhere have petitioners alleged, much less filed a declaration, that they *attempted* to communicate with the detainees and were prevented from doing so. Although petitioners may regard such efforts as futile and thus unnecessary, to bolster their claimed standing as "next friends" it would have been helpful if they had tried anyway.[7]

To summarize, the court finds that the cases on which respondents rely to establish that petitioners lack a sufficient relationship with the detainees or that petitioners can be dismissed as "uninvited meddlers" are all factually distinguishable. Yet these cases state the governing legal principles of standing, and this district court is required to apply them. Petitioners may not be "uninvited meddlers" in the same sense as the petitioners in those cases, but they do lack a "significant relationship" with the detainees – indeed, any relationship. To permit petitioners to seek a writ of habeas corpus on a record devoid of any evidence that they have sought authorization to do so, much less obtained implied authority to do so, would violate the second prong of the *Whitmore-Massie* test. And

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[7] The court is not suggesting that the mere failure of a "next friend" to establish direct communication with the prisoner and obtain explicit authorization from him is enough to preclude "next friend" petitioners. If it were, then there would be an incentive for the government to keep all captives, even United States citizens, incommunicado. Although respondents are not advocating that unacceptable and illegal result, a too-expansive interpretation of "uninvited meddlers" could lead to it.

it would invite well-meaning proponents of numerous assorted "causes." to bring lawsuits on behalf of unwitting strangers. For these reasons, then, the court finds that petitioners lack standing to file this petition on behalf of detainees. [8]

Under standard principles governing leave to amend pleadings, if petitioners sought to amend their petition in order to supplement their claims of standing, this court would be expected to grant such leave. That is not the case, however, if the amended petition, or any amended petition, would be a legal "futility" because it could not satisfy the other jurisdictional requirements. For that reason, the court must proceed to discuss those requirements, for if they preclude this court from exercising jurisdiction then the petition should be dismissed without leave to amend.

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[8] At the hearing today, Prof. Erwin Chemerinsky, one of the named petitioners (but not the author of petitioners' court papers), argued that the requirement that "next friends" demonstrate a "significant relationship" with the real parties in interest should be relaxed where the real parties lack access to court. He urged that general principles of standing under the constitutional requirements of Art. III favor such an approach. The court chooses to apply the standards enunciated in the *Whitmore-Massie* line of cases and notes that in *Whitmore* the Supreme Court stated that the limitations on standing that it was applying were in fact required by Article III, and were not based merely on "prudential" limitations. 492 U.S. at 156 n. 1, 109 S.Ct. 2841.

IV.

THIS COURT LACKS JURISDICTION TO ISSUE THE WRIT BECAUSE NO CUSTODIAN IS WITHIN THE TERRITORIAL JURISDICTION OF THE COURT.

Respondents argue that even if petitioners have standing this court lacks jurisdiction to entertain this petition because no custodian responsible for the custody of the detainees is present in the territorial jurisdiction of this district. Respondents are correct.

The federal statute governing habeas petitions provides that "writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions.*" 28 U.S.C. § 2241(a) (emphasis added). As the Supreme Court has explained, "the phrase 'within their respective jurisdictions' acts as an obvious limitation upon the action of individual judges" because it reflects the conclusion of Congress that it would be "inconvenient, potentially embarrassing, certainly expensive and on the whole quite unnecessary to provide every judge anywhere with the authority to issue the Great Writ on behalf of applicants far distantly removed from the courts whereon they sat." *Carbo v. United States,* 364 U.S. 611, 617, 81 S.Ct. 338, 342, 5 L.Ed.2d 329 (1961).[9]

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[9] In *Braden v. 30th Judicial Circuit Court,* 410 U.S. 484, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973), the Supreme Court noted that a writ of habeas corpus is issued to the person who has allegedly detained the prisoner unlawfully and held that a federal court with jurisdiction over the custodian can exercise jurisdiction even if the prisoner is outside that court's jurisdiction.

In *Schlanger v. Seamans,* 401 U.S. 487, 91 S.Ct. 995, 28 L.Ed.2d 251 (1971), the Supreme Court held that the Arizona District Court lacked jurisdiction over a habeas petition because the only custodian of the petitioner was outside that district. *Id.* at 490-91, 91 S.Ct. 995. It stated, "the District Court in Arizona has no custodian within its reach against whom its writ can run. . . . [T]he absence of [petitioner's] custodian is fatal to the jurisdiction of the Arizona District Court." *Id.* at 491, 91 S.Ct. 995. The Ninth Circuit has applied this rule several times, and the rule is so well-settled that it is unnecessary to cite these cases. Moreover, the Ninth Circuit has expressly held that 28 U.S.C. § 1391(e), which provides for nationwide service of process on officers of the United States, does not extend habeas corpus jurisdiction to persons outside the territorial limits of the district court. *Dunne v. Henman,* 875 F.2d 244, 248 (9th Cir.1989); *accord, Schlanger,* 401 U.S. at 490 n. 4, 91 S.Ct. 995.[10]

It is clear, then, that because there is no showing or allegation that any named respondent is within the territorial jurisdiction of the Central District of California, this court lacks jurisdiction to issue the writ requested by petitioners. It is also true, however, that in cases where the petitioner's direct custodian is outside the territorial jurisdiction of the court where the petition is filed, jurisdiction does lie in a district court where anyone in the "chain of command" with control over the petitioner is present. *Ex Parte Hayes,* 414 U.S. 1327, 1328, 94 S.Ct. 23,

[10] Despite the clear holding of these cases, petitioners' counsel argued in his brief that section 1391 permits this court to subject the respondents to jurisdiction on this basis.

24, 38 L.Ed.2d 200 (1973); *cf. Kinnell v. Warner,* 356 F.Supp. 779, 782 (D.Hawai'i 1973) ("Anyone in the 'chain of command' with control over petitioner's whereabouts is that petitioner's proper custodian for habeas purposes."). Here, petitioners have named as respondents several individuals who are custodians of the detainees, either because they are directly responsible for their detention or are within the "chain of command" of those directly responsible. At least some of those respondents are present within the territorial jurisdiction of the District Court for the District of Columbia. If the federal court in that district can exercise jurisdiction over this petition, federal law, at least in this circuit, mandates not dismissal, but transfer to that court.

> Whenever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action . . . to any other such court in which the action or appeal could have been brought at the time it was filed or noticed. . . .

28 U.S.C. § 1631.

In *Miller v. Hambrick,* 905 F.2d 259 (9th Cir.1990), the Court of Appeals stated,

> Normally, transfer will be in the interest of justice because normally dismissal of an action that could be brought elsewhere is "time-consuming and justice defeating." . . . [This approach] was adapted to habeas corpus in applying 28 U.S.C. § 2241(d), the provision to habeas corpus in a State which contains two or more judicial districts . . . Now under 28 U.S.C. § 1631 the same

> approach can be taken generally in habeas corpus proceedings . . .

Id. at 262 (citations omitted).

In *Cruz-Aguilera v. INS,* 245 F.3d 1070, 1073-74 (9th Cir.2001), the Court of Appeals cited the above language from *Miller* and added that "[b]ecause the statute's language is mandatory, federal courts should consider transfer without motion by the parties."

Transfer to the United States District Court for the District of Columbia is appropriate if three conditions are met: (1) the transferring court lacks jurisdiction; (2) the transferee court could have exercised jurisdiction at the time the action was filed; and (3) the transfer is in the interest of justice. *Id.* As to condition (1), this Court has already found that it lacks jurisdiction. As to condition (3), a court is required to construe a habeas petition in the light most favorable to the petitioners. That requires this court to assume, without actually finding, that the allegations in this petition that the detainees' rights have been violated are true. Construing the petition that way, transfer would be in the interests of justice, for it would avoid a "'time-consuming'" and "'justice-defeating'" dismissal. *Miller,* 905 F.2d at 262 (quoting *Goldlawr, Inc. v. Heiman,* 369 U.S. 463, 467, 82 S.Ct. 913, 8 L.Ed.2d 39 (1962)).

What remains for determination, therefore, is whether even though respondents are within the jurisdiction of another court – the District of Columbia – that court (or *any* federal court) has the authority to exercise jurisdiction over the parties and claims asserted in this petition. It is to that question that the Court will now turn.

V.

NO DISTRICT COURT HAS JURISDICTION OVER THIS PETITION

A. *Johnson v. Eisentrager Compels Dismissal If the Detainees Are Outside the Sovereign Territory of the United States.*

As this Court suggested in its previous order, the key case is *Johnson v. Eisentrager,* 339 U.S. 763, 70 S.Ct. 936, 94 L.Ed. 1255 (1950). Because the Supreme Court's holding in *Johnson* is controlling here, the decision warrants careful review.

In *Johnson,* Mr. Justice Jackson described "the ultimate question" as "one of jurisdiction of civil courts of the United States vis-a-vis military authorities in dealing with enemy aliens overseas." *Id.* at 765, 70 S.Ct. 936. The case arose out of World War II. The habeas petitioners were twenty-one German nationals who claimed to have been working in Japan for "civilian agencies of the German government" before Germany surrendered on May 8, 1945. They were taken into custody by the United States Army and convicted by a United States Military Commission of violating laws of war by engaging in continued military activity in Japan after Germany's surrender, but before Japan surrendered.[11] The Military Commission sat in China with the consent of the Chinese government. After trial and conviction there, the prisoners were repatriated

[11] The Supreme Court has "characterized as 'well-established' the power of the military to exercise jurisdiction over . . . enemy belligerents, prisoners of war or others charged with violating the laws of war." *Johnson,* 339 U.S. at 786, 70 S.Ct. 936 (citations deleted).

to Germany to serve their sentences in a prison whose custodian was an American Army officer. While in Germany, the petitioners filed a writ of habeas corpus claiming that their right under the Fifth Amendment to due process, other unspecified rights under the Constitution and laws of the United States and provisions of the Geneva Convention governing prisoners of war all had been violated. *Id.* at 765-767, 70 S.Ct. 936. They sought the same relief as petitioners here: that they be produced before the federal district court to have their custody justified and then be released. They named as respondents the prison commandant, the Secretary of Defense and others in the civilian and military chain of command.

Reversing the Court of Appeals, the Supreme Court in *Johnson* upheld the district court's dismissal of the petition on the ground that petitioners had no basis for invoking federal judicial power in any district. *Id.* at 790-91, 70 S.Ct. 936. In reaching that conclusion, the Supreme Court stated the following:

> • "[T]he privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection. No such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is *sovereign* and the circumstances of their offense [and] their capture . . . were all beyond the territorial jurisdiction of any court of the

United States." *Id.* at 777-78, 70 S.Ct. 936 (emphasis added).[12]

- "We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes." *Id.* at 767, 70 S.Ct. 936.

- "A basic consideration in habeas corpus practice is that the prisoner will be produced before the court. . . . To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. . . . The writ, since it is . . . [argued] to be a matter of right, would be equally available to enemies during active hostilities. . . . Such trials would hamper the war effort. . . . It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home . . . " *Id.* at 778-79, 70 S.Ct. 936.

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[12] In emphasizing the importance of sovereignty, the Court distinguished its earlier decision in *In re Yamashita*, 327 U.S. 1, 66 S.Ct. 340, 90 L.Ed. 499 (1946). There, a Japanese general convicted by an American Military Commission in the Philippines, challenged the authority of the Commission to try him. The Supreme Court denied his habeas petition on the merits. The *Johnson* court noted that, unlike the status of Guantanamo (*see infra*), the United States had "sovereignty" over the Philippines at the time, which is why Yamashita was entitled to access to the courts. *Id.* at 781, 70 S.Ct. 936.

Although there has been no decision since *Johnson* that involves facts comparable to those in this case, other courts have either followed *Johnson* or acknowledged its precedential authority. *See, e.g., Zadvydas v. Davis,* 533 U.S. 678, 121 S.Ct. 2491, 2500, 150 L.Ed.2d 653 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. *See, United States v. Verdugo-Urquidez,* 494 U.S. 259, 269, 273-275, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990) (Fifth Amendment's protections do *not* extend to aliens outside the territorial boundaries); *Johnson v. Eisentrager,* 339 U.S. 763, 784, 70 S.Ct. 936, 94 L.Ed. 1255 (same).") In *Verdugo-Urquidez, supra,* the Supreme Court also cited *Johnson* (494 U.S. at 273, 110 S.Ct. 1056) and added, "If there are to be restrictions on searches and seizures of aliens outside of the United States which occur incident to . . . American action [abroad], they must be imposed by the political branches through diplomatic understanding, treaty or legislation." *Verdugo-Urquidez, supra,* 494 U.S. at 275, 110 S.Ct. 1056.

In all key respects, the Guantanamo detainees are like the petitioners in *Johnson:* They are aliens; they were enemy combatants; they were captured in combat; they were abroad when captured; they are abroad now; since their capture, they have been under the control of only the military; they have not stepped foot on American soil; and there are no legal or judicial precedents entitling them to pursue a writ of habeas corpus in an American civilian court. Moreover, there are sound practical reasons, such as legitimate security concerns, that make it unwise for this or any court to take the unprecedented step of conferring such a right on these detainees.

Petitioners nevertheless argue that *Johnson* "is both factually and legally inapposite for numerous reasons." Petitioners' first supposed distinction is that in *Johnson* the petitioners already had been given access to American courts. Not so; the tribunal in *Johnson* was a Military Commission functioning in China; the petitioners there, as here, were seeking to get *into* a federal court.[13] Next, petitioners argue that there are issues of fact that underlie jurisdiction which must be resolved before dismissal. Petitioners do not state what those supposed issues are and in any event the question before this court *is* a purely legal one, as in *Johnson*. Finally, as petitioners put it, "[m]ost importantly the detainees are 'present' in the United States of America, because Guantanamo Naval Base is, as a matter of both fact and law, the United States of America." (Response, p. 15).

Petitioners' last argument requires the Court to assess the legal and juridical status of the Guantanamo Bay Naval Base.

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[13] It appears that the Guantanamo detainees will also be subjected to trial before military commission. On November 13, 2001, the President issued an Executive Order entitling members of Al Qaeda and other individuals associated with international terrorism who are under the control of the Secretary of Defense to be tried before "one or more military commissions" that will be governed by "rules for the conduct of the proceedings . . . [and] which shall at a minimum provide for . . . a full and fair trial, with the military commission sitting as the triers of both fact and law. . . . " *See* Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Register 57,833 (November 13, 2001). Thus, it appears that the detainees are similar to the petitioners in *Johnson* in this respect, too.

B. *Detainees were seized and at all times have been held outside the sovereign territory of the United States.*

Johnson establishes that whether the Guantanamo detainees can establish jurisdiction in any district court depends not on the nature of their claims but on whether the Naval Base at Guantanamo Bay is under the sovereignty of the United States. Petitioners argue that the detainees are now within the territorial jurisdiction of the United States and thus are entitled to a writ of habeas corpus. But there is a difference between territorial jurisdiction and sovereignty, and it is the latter concept that is key. *See United States v. Spelar,* 338 U.S. 217, 70 S.Ct. 10, 11, 94 L.Ed. 3 (1949), in which the Supreme Court observed, "We know of no more accurate phrase in common English usage than 'foreign country' to denote territory subject to the sovereignty of another nation." The Court finds that Guantanamo Bay is *not* within the sovereign territory of the United States and therefore rejects petitioners' argument.

The legal status of Guantanamo Bay is governed by a lease agreement entered into by the United States and Cuba in 1903 and extended by those countries in 1934. *See* Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, T.S. No. 418 ("Lease Agreement"); Treaty Between the United States of America and Cuba Defining Their Relations, May 29, 1934, art. III, 48 Stat. 1682, 1683. The 1903 agreement provides that the United States shall lease Guantanamo Bay from the Republic of Cuba for use as a coaling or naval station. Lease Agreement, art. I. Article III of the 1934 Treaty provides that the 1903 lease shall "continue in effect" until the parties agree to modify or abrogate it.

As to the legal status of Guantanamo Bay so long as it is leased to the U.S., the 1903 agreement states:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas.

Lease Agreement, art. III.

It is telling that in their brief petitioners do not even mention the first clause of the 1903 agreement, which provides that Cuba explicitly retained sovereignty. The omission suggests that they realize that sovereignty is the dispositive issue.

Relying instead only on the second clause, petitioners argue that because the Lease Agreement provides that Guantanamo Bay is under the "complete jurisdiction and control" of the United States, the detainees effectively are being held within United States territory and thus are entitled to the writ of habeas corpus.

One need only read the lease to realize that petitioners' argument that "jurisdiction and control" is equivalent to "sovereignty" is wrong. The agreement explicitly distinguishes between the two in providing that Cuba retains "sovereignty" whereas "jurisdiction and control" are exercised by the United States. Cuba and the United States defined the legal status of Guantanamo Bay, and this court has no basis, much less authority, to ignore their determination. *Vermilya-Brown Co. v. Connell,* 335 U.S.

377, 380, 69 S.Ct. 140, 93 L.Ed. 76 (1948). ("[T]he determination of sovereignty over an area is for the legislative and executive departments.").

In addition to the express terms of the Lease Agreement, the only federal courts that have addressed the issue have held that Guantanamo Bay is not within the sovereign territory of the United States and is not the functional equivalent of United States sovereign territory. In *Cuban American Bar Assoc. v. Christopher,* 43 F.3d 1412, 1425 (11th Cir.1995), *cert. denied,* 515 U.S. 1142, 115 S.Ct. 2578, 132 L.Ed.2d 828 and 516 U.S. 913, 116 S.Ct. 299, 133 L.Ed.2d 205 (1995), the Eleventh Circuit had to determine whether Cuban and Haitian migrants temporarily detained at the Guantanamo Bay Naval Base could assert rights under various United States statutes and the United States Constitution. *Cuban American Bar Assoc.,* 43 F.3d at 1421. Citing the language of the Lease Agreement quoted above, the Court of Appeals stated "the district court erred in concluding that Guantanamo Bay was a 'United States territory.' We disagree that control and jurisdiction is equivalent to sovereignty." *Id.* at 1425. The Court of Appeals then went on to reject the argument that United States military bases which are leased abroad and remain under the sovereignty of foreign nations are "'functionally equivalent' to being . . . within the United States." *Id. See also Bird v. United States,* 923 F.Supp. 338, 342-43 (D.Conn.1996) (holding that sovereignty over Guantanamo Bay rested with Cuba and therefore plaintiff's tort claim was barred under the "foreign country"

exception of the Federal Tort Claims Act). The court finds the analyses and conclusions of these courts persuasive.[14]

For the foregoing reasons, the court finds that sovereignty over Guantanamo Bay remains with Cuba. The court therefore holds that petitioners' claim that the Guantanamo detainees are entitled to a writ of habeas corpus is foreclosed by the Supreme Court's holding in *Johnson*.

VI.

CONCLUSION

The Court understands that many concerned citizens, here and abroad, believe this case presents the question of whether the Guantanarno [sic] detainees have *any* rights at all that the United States is bound, or willing, to recognize. That question is *not* before this Court and nothing in this ruling suggests that the captives are entitled to no legal protection whatsoever. For this Court is

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[14] The cases on which petitioners mainly rely to avoid this result do not support their arguments. *United States v. Corey*, 232 F.3d 1166 (9th Cir.2000), not a habeas case, merely reached the unexceptional conclusion that federal courts have jurisdiction over a criminal case charging a *United States citizen* with offenses committed at United States installations abroad. *Cobb v. United States*, 191 F.2d 604 (9th Cir.1951) does not hold – indeed, rejected the view – that America's exclusive control over the Guantanamo Naval Base constitutes *de jure* sovereignty; Okinawa, not Guantanamo Bay, was at issue in *Cobb* and the court found that *de jure* sovereignty over Okinawa had *not* passed to the United States, so Okinawa was still a "foreign country" within the meaning of the Federal Tort Claims Act. *Id.* at 608. Finally, the judgment in *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir.1992) was vacated by the Supreme Court in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 918, 113 S.Ct. 3028, 125 L.Ed.2d 716 (1993).

> not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the [1949] Geneva Convention . . . concluded an agreement upon the treatment to be accorded captives. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.

Johnson, 339 U.S. at 789, 70 S.Ct. 936.[15]

For the foregoing reasons, the Verified Petition For Writ of Habeas Corpus and the Verified First Amended Petition are both DISMISSED with prejudice.

IT IS SO ORDERED.

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[15] The President recently declared that the United States will apply the rules of the Geneva Convention to at least some of the detainees. *See "U.S. Will Apply Geneva Rules to Taliban Fighters,"* Los Angeles Times, February 8, 2002 at A1.

APPENDIX C

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STEPHEN YAGMAN

November 22, 2002

Hon. G.W. Bush
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear Mr. Bush:

This office represents the Coalition of Clergy, Lawyers, and Professors, who requests that you transmit to all detainees held by the United States at Camp X-Ray at Gunatanamo Bay, Cuba, both a copy of the attached letter and a translation of the letter into the language of each detainee to whom the letter is delivered. Also, it is requested that you facilitate each detainee being able to communicate with this office in response to the enclosed letter.

It would be appreciated if you would do this promptly, and in no event later than December 6, 2002, and communicate to this office that you have accomplished it. Also, please provide to this office the names of all persons to whom the enclosed letter has been provided.

Thank you for your expected cooperation in this matter.

Very truly yours,

STEPHEN YAGMAN

Enclosure-as noted

LAW OFFICES
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STEPHEN YAGMAN

November 22, 2002

To: Detainees of the United States at Camp X-Ray, Guantanamo Bay, Cuba

Dear Detainee:

This law firm represents the Coalition of Clergy, Lawyers & Professors, who wish to provide free legal assistance to you, if you want that assistance.

In January 20, 2002, we filed a lawsuit in the federal court to ask that each of your names be made public, that the reason each of you is being held be made known, and that you be given an opportunity to come before a civilian, federal United States court to assert your rights.

The judge threw out the lawsuit, and we appealed to a higher court.

On November 18, the higher court ruled that, among other things, we had not shown we had tried to contact you or that you would want us to try to assist you, and that we, therefore, should not be able to attempt to help you.

Therefore, I am writing this letter to you, through the President of the United States, and ask you to contact me by writing to me or by telephoning me, or by having anyone you chose, or some member of your family or some friend of yours, get in touch with me, to ask for our help, if

you want it. If you do that, help will be provided to you, free of any charge.

Sincerely,

STEPHEN YAGMAN

Supreme Court, U.S.
FILED
APR 9 2003
OFFICE OF THE CLERK

No. 02-1155

In the Supreme Court of the United States

COALITION OF CLERGY, LAWYERS & PROFESSORS, ET AL., PETITIONERS

v.

GEORGE WALKER BUSH, PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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2211P

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners, an ad hoc group of clergy, lawyers, and professors with no relationship with any of the individuals on whose behalf they purport to sue, lack next-friend standing to seek a writ of habeas corpus on behalf of the alien detainees held by the United States military at the naval base at Guantanamo Bay, Cuba.

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In the Supreme Court of the United States

No. 02-1155

COALITION OF CLERGY, LAWYERS & PROFESSORS, ET AL., PETITIONERS

v.

GEORGE WALKER BUSH, PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 310 F.3d 1153. The opinion of the district court (Pet. App. 30-59) is reported at 189 F. Supp. 2d 1036.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 2002. A petition for rehearing was denied on January 15, 2003. The petition for a writ of certiorari was filed on February 3, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the wake of the September 11, 2001, terrorist attacks on the United States, the President, acting in his capacity as Commander in Chief and with the full backing of Congress,[1] dispatched armed forces to Afghanistan to fight the al Qaida terrorist network and the Taliban regime. In the course of those operations, the United States military and its allies captured or secured the surrender of thousands of armed combatants fighting for al Qaida and the Taliban. The United States military took control of many of these combatants, acting under the President's authority as Commander in Chief and under the laws and customs of war, which permit holding combatants in an armed conflict. The military subsequently transferred a number of such combatants to the United States Naval Base at Guantanamo Bay, Cuba.

Since their transfer to Cuba, detainees have been visited by the International Red Cross and by personnel from their home countries, and have been permitted to write to family members. See Pet. App. 12. "Family members have filed habeas petitions on the behalf of some detainees, and diplomats from several countries including Pakistan, Kuwait, Australia, and the United Kingdom have made inquiries into the status of the detainees and sought their release." *Ibid.* (citing *Rasul* v. *Bush*, 215 F. Supp. 2d 55, 57-58 (D.D.C. 2002), aff'd, 321 F.3d 1134 (D.C. Cir. 2003) (petitions brought on detainees' behalf by parents and other family members as next friends)); cf. *Hamdi* v. *Rumsfeld*, 296 F.3d 278, 280-281 (4th Cir. 2002) (*Hamdi II*) (habeas petition brought by detainee's father as next

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[1] See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224.

friend on behalf of enemy combatant seized in Afghanistan and held at Guantanamo and then transferred to Norfolk Naval Station Brig).

2. The Guantanamo Naval Base is in the sovereign territory of the Republic of Cuba. The United States uses and occupies the base under a 1903 lease agreement with Cuba, which is continued in effect by a 1934 Treaty.[2] By its terms, the Lease Agreement provides that Cuba retains sovereignty over the leased lands:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased area], on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas.

Lease of Land for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, art. III, T.S. No. 418 (Lease Agreement). Under a supplementary agreement, the United States agreed to additional lease terms, including a limit on establishing commercial or industrial enterprises on the lands. See Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, art. III, T.S. No. 426.

3. Petitioners are an ad hoc "coalition" of clergy, lawyers, and professors who have filed a petition for a writ of habeas corpus challenging the military's detention at Guantanamo of combatants captured in Afghani-

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[2] See Lease Agreement, art. III; Treaty Defining Relations with Cuba, May 29, 1934, U.S.-Cuba, art. III, 48 Stat. 1683 (extending lease "[u]ntil the two contracting parties agree to the modification or abrogation of the stipulations").

stan. Petitioners did not allege that they were personally subject to or injured by the challenged conduct, nor did they allege any relationship between themselves and any of the detainees. Petitioners nonetheless claimed standing as "next friends" to seek habeas corpus relief on the detainees' behalf.

On February 21, 2002, the district court held that it lacked jurisdiction over petitioners' habeas claims. Pet. App. 33. Specifically, the court held that because petitioners lacked a "significant relationship" with detainees, they lacked next-friend standing to sue on their behalf. *Id.* at 40-45. The court emphasized that petitioners had *no* relationship with the detainees. See *id.* at 43-44. Accordingly, the court held that to permit petitioners or other self-appointed parties to file habeas petitions as next friends "would invite well-meaning proponents of numerous assorted 'causes' to bring lawsuits on behalf of unwitting strangers." *Id.* at 45.

The district court alternatively held that, even if petitioners had standing, it lacked territorial jurisdiction to issue a writ of habeas corpus. The court invoked the "well-settled" rule that a district court's habeas corpus jurisdiction is limited to custodians within its territorial jurisdiction, and it explained that none of the named respondent custodians in this case was present within the Central District of California. See Pet. App. 46-49. Citing *Schlanger* v. *Seamans*, 401 U.S. 487, 490 n.4 (1971), and *Dunne* v. *Henman*, 875 F.2d 244, 248 (9th Cir. 1989), the court rejected petitioners' argument that 28 U.S.C. 1391(e) authorized it to issue a writ of habeas corpus to government officials anywhere in the country. Pet. App. 47.

Finally, the court held that, even apart from petitioners' lack of standing and its own lack of territorial jurisdiction, *Johnson* v. *Eisentrager*, 339 U.S. 763

(1950), would preclude it from exercising habeas corpus jurisdiction on behalf of the Guantanamo detainees. See Pet. App. 50-58. The court explained that the Guantanamo detainees are similar "[i]n all key respects" to the petitioners in *Eisentrager*, which held that the federal courts lacked jurisdiction to consider a petition for habeas corpus filed by German nationals taken into custody and held by United States military authorities in Germany. *Id.* at 53. The court rejected petitioners' argument that *Eisentrager* is distinguishable on the ground that the Guantanamo detainees are "'present' in the United States." *Id.* at 54; see *id.* at 55-57. In so doing, it found that Cuba retains sovereignty over Guantanamo, which is the "dispositive" factor under *Eisentrager*. *Id.* at 56.

4. The court of appeals unanimously affirmed, holding that "the Coalition lacks next-friend and third-party standing to bring a habeas petition on behalf of the detainees." Pet. App. 3. The court recognized that 28 U.S.C. 2242 permits federal habeas petitions to be brought "by someone acting [on] behalf" of a prisoner, and that the "actual practice codified by Congress" in the federal habeas statute was to allow "next-friend habeas standing" only where "there was a significant pre-existing relationship between the prisoner and the putative next friend." Pet. App. 5-7 (citing, *inter alia*, *Whitmore* v. *Arkansas*, 495 U.S. 149 (1990)).

The court held that petitioners failed to satisfy the requirements for next-friend standing because they had "not demonstrated *any* relationship" with the detainees, "either as to any individual detainee or to the detainees *en masse*." Pet. App. 16-17 (first emphasis added). Under *Whitmore*, the court recognized, the mere "concern[] * * * that 'unconstitutional laws [are being] enforced'" does not give rise to standing. Pet.

App. 13 (brackets in original) (quoting *Whitmore*, 495 U.S. at 166). The court found it unnecessary to decide how significant a next-friend relationship must be to satisfy constitutional and prudential requirements, because petitioners' inability to show "*any* connection or association * * * with any detainee" meant that they failed even the most lenient standard. *Id.* at 16-17 (emphasis added).[3] Finally, the court rejected petitioners' claim of third-party standing, holding that petitioners could not demonstrate either injury-in-fact or a close relationship with the detainees. *Id.* at 18-19.

The court of appeals declined to consider whether a federal court would have jurisdiction over a petition brought by a proper next friend on behalf of the detainees. Pet. App. 20-21. Reasoning that the district court should not have "adjudicate[d] the habeas rights of individual detainees, when [petitioners] lack standing and [individual detainees] were not before the court," the court of appeals vacated the district court's alternate holdings that it lacked jurisdiction because no custodian was within its territorial jurisdiction and that no court would have jurisdiction over a habeas corpus petition on behalf of the Guantanamo detainees under *Eisentrager*. *Ibid.*

Petitioners filed a petition for rehearing and suggestion of rehearing en banc, which was denied without dissent.

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[3] Because the court concluded that petitioners lacked an adequate relationship with the detainees, it declined to decide whether they met the second requirement for next-friend standing, that the detainees lack access to a court to litigate on their own behalf. Pet. App. 13.

ARGUMENT

The court of appeals properly, and unanimously, held that petitioners lack standing to bring a habeas petition on behalf of the Guantanamo detainees, with whom petitioners have no relationship whatsoever. That ruling is a straightforward and fact-specific application of this Court's decision in *Whitmore* and the well-established principle that "a generalized interest in constitutional governance" does not give rise to standing. 495 U.S. at 164. The decision below does not conflict with any decision of this Court or of any court of appeals. Accordingly, plenary review of that ruling by this Court is not warranted.

Nor is certiorari warranted to review the second and third questions presented by the petition. The court of appeals expressly refused to rule on those questions and *vacated* the portions of the district court's decision addressing them. The court of appeals correctly reasoned, as respondents had urged in both the district court and court of appeals, that any rights of the detainees should not be litigated by persons without standing to represent the detainees. In any event, the district court's resolution of those questions was also correct and, accordingly, does not warrant further review by this Court.

1. a. The court of appeals correctly held that petitioners lack next-friend standing. In *Whitmore*, this Court set out the "two firmly rooted prerequisites for 'next friend' standing" in federal court: (i) there must be some barrier, "such as inaccessibility, mental incompetence, or other disability," that prevents the real party in interest from litigating on his own behalf; and (ii) "the 'next friend' must be truly dedicated to the best interests of the person on whose behalf he seeks to

litigate," as demonstrated by a "significant relationship" to the real party in interest. 495 U.S. at 163-164 (citation omitted).

It is clear that the lack of *any* relationship between petitioners and the detainees defeats petitioners' assertion of next-friend standing. Petitioners are "stranger[s] to the detained persons and their case," *Whitmore*, 495 U.S. at 164; they have no relationship whatsoever with any of the detainees; and they have asserted, at most, a desire to ensure that the military's treatment of the detainees complies with the United States Constitution and international law. See Pet. App. 17-18; Pet. 2. *Whitmore* makes clear that this type of "generalized interest in constitutional governance" is insufficient for next-friend standing. 495 U.S. at 164; see *id.* at 166 ("However friendly [concerned citizens] may be * * * and sympathetic for [a prisoner's] situation, however concerned [they] may be lest unconstitutional laws be enforced, and however laudable such sentiments are, the grievance they suffer and feel is not special enough to furnish a cause of action in a case like this.") (quoting *Gusman* v. *Marrero*, 180 U.S. 81, 87 (1901)).

Petitioners mistakenly argue that 28 U.S.C. 2242 does not require them to have a relationship with the detainees on whose behalf they seek to act. But, as this Court recognized in *Whitmore*, Section 2242 merely "codified the historical practice." 495 U.S. at 165; see 28 U.S.C. 2242 Historical and Revision Notes (amendment permitting next-friend petitions intended to "follow[] the actual practice of the courts"). That practice, dating back to the English common law, was to allow a petition to be filed by someone with a significant relationship with a detainee—a detainee's family member, close friend, or a person "authorized to act on

behalf of the one restrained of his liberty," *Collins* v. *Traeger*, 27 F.2d 842, 843 (9th Cir. 1928). However, that practice denied standing to "intruders or uninvited meddlers, styling themselves next friends," with no preexisting relationship with the detainee, *Whitmore*, 495 U.S. at 164 (quoting *United States ex rel. Bryant* v. *Houston*, 273 F. 915, 916 (2d Cir. 1921)); see Pet. App. 6-10 (discussing history of next-friend standing doctrine).[4]

Petitioners' contrary argument is based on the erroneous assertion that the requirement of a relationship between a next friend and the real party in interest is merely a prudential limit on standing that Section 2242 overrode. See Pet. 8-9. But that contention is doubly flawed. First, Section 2242 did not eliminate the significant relationship test, as *Whitmore* itself made clear. *Whitmore* both noted that Section 2242 codified prior practice and that prior practice required a significant relationship. Second, as this Court also recognized in *Whitmore*, the requirement of at least some relationship with the detainee is a constitutional imperative. See 495 U.S. at 155, 156 & n.1, 163-165. Without such a restriction, any person with a generalized interest in the treatment of a detainee unable to sue on his own behalf—*i.e.*, any person who wished to ensure that "the Government act[s] in accordance with law," *Allen* v. *Wright*, 468 U.S. 737, 754 (1984)—could "circumvent the jurisdictional limits

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[4] For this reason, the Fourth Circuit recognized in *Hamdi* v. *Rumsfeld*, 294 F.3d 598 (4th Cir. 2002) (*Hamdi I*), that this Court's decision in *Whitmore* is "most faithfully understood as requiring a would-be next friend to have a significant relationship with the real party in interest." *Id.* at 604. The court of appeals below cited this analysis favorably and viewed it as consistent with its prior decision in *Massie ex rel. Kroll* v. *Woodford*, 244 F.3d 1192, 1194 (9th Cir. 2001). Pet. App. 10, 15-16.

of Art. III simply by assuming the mantle of 'next friend.'" *Whitmore*, 495 U.S. at 164; see *Lenhard* v. *Wolff*, 443 U.S. 1306, 1312 (1979) (Rehnquist, J., in chambers) ("[H]owever worthy and high minded the motives of 'next friends' may be, they inevitably run the risk of making the actual defendant a pawn to be manipulated on a chessboard larger than his own case."); Pet. App. 16 ("*Whitmore* is [] most faithfully understood as requiring a would-be next friend to have a significant relationship with the real party in interest.") (citation omitted).

Here, without any relationship with the detainees, petitioners cannot demonstrate that they are "truly dedicated to the best interests of" the detainees. *Whitmore*, 495 U.S. at 163. They have no greater claim to represent the detainees than any other concerned individual. This problem is only underscored by petitioners' effort to represent the Guantanamo detainees *en masse*. Petitioners have no idea whether individual detainees actually desire to challenge their confinement by attempting to invoke the jurisdiction of the courts of the United States—a country against which they have engaged in hostilities—or which claims they would want to press. Some detainees might support this action, while others might want nothing to do with United States courts. Furthermore, there is no reason to believe that detainees wish to be represented by petitioners, with whom they have no relationship, rather than family members or others who might sue on their behalf. As the court of appeals recognized, family members of a number of detainees who petitioners at least initially purported to represent have already filed habeas corpus petitions on the detainees' behalf. Pet. App. 12 (citing *Rasul* v. *Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), aff'd, 321 F.3d 1134 (D.C. Cir. 2003);

Hamdi v. *Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) (*Hamdi II*)); see Pet. App. 12 (concluding "the prisoners are not being held incommunicado"); see also *Al Odah* v. *United States*, 321 F.3d 1134, 1137-1144 (D.C. Cir. 2003) (addressing claims of certain Guantanamo detainees in a case brought by family members as the detainees' next friends).

Petitioners have not cited a single decision by this Court or a court of appeals in which a third party was permitted to litigate a next-friend action on behalf of a stranger, and the government is unaware of any such decision. The Fourth Circuit, in addressing similar efforts by strangers to file petitions for habeas corpus, held that an attorney and a private citizen with no prior relationship with a detained enemy combatant lacked standing to bring a habeas corpus petition on the detainee's behalf. *Hamdi* v. *Rumsfeld*, 294 F.3d 598, 605-606 (2002) (*Hamdi I*). Allowing "a next friend who files suit on behalf of a total stranger" to proceed as a next friend, the Fourth Circuit reasoned, would be "in irreconcilable conflict with basic constitutional doctrine." *id.* at 607. As the Fourth Circuit recognized in *Hamdi I*, courts of appeals have overwhelmingly concluded that a would-be next friend must have *some* relationship with the prisoner he seeks to represent. See *id.* at 604-605 (collecting cases). The uniformity of precedent demonstrates the lack of any need for guidance from this Court about application of the principle that a "generalized interest * * * in constitutional governance" does not confer Article III standing. *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974).

b. The court of appeals also correctly held that petitioners lack third-party standing "because neither [the Coalition] nor its members can demonstrate either

* * * an injury-in-fact or * * * a close relationship" with the detainees. Pet. App. 19. In order to satisfy Article III requirements for third-party standing, a would-be litigant must show that he *personally* has suffered an injury in fact. See, *e.g.*, *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 102-104 (1998); *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). A litigant must also show "a close relation to the third party" whose rights he invokes. *Powers* v. *Ohio*, 499 U.S. 400, 411 (1991); *Shaw* v. *Hahn*, 56 F.3d 1128, 1130 n.3 (9th Cir.), cert. denied, 516 U.S. 964 (1995). Petitioners implicitly concede that they satisfy neither requirement, defeating their claim to third-party standing under the same constitutional principles that bar their standing as next friends.

c. This petition provides a particularly poor vehicle to consider the law of next-friend and third-party standing. Petitioners are in the relatively rare situation of attempting to litigate on behalf of detainees with whom they have *absolutely no relationship*. Whatever questions may arise as to the exact quantum of relationship that is required by Article III are not implicated in a case where no relationship at all is alleged. Moreover, this is not a case where in the absence of this litigation going forward there are no traditional next friends available to bring claims challenging the detention of enemy combatants held at Guantanamo. Such claims have been brought by family members, and the government has not raised any next-friend standing objections, although it has prevailed, to date, on alternative jurisdictional grounds. See *Al Odah*, 321 F.3d at 137-1144.[5]

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[5] Petitioners themselves, moreover, have attempted to relitigate the decisions below by refiling essentially the same petition

2. a. Petitioners urge the Court to grant certiorari to review two additional questions: whether the fact that no custodians were within the district court's territorial jurisdiction would have barred the court's exercise of habeas jurisdiction; and whether, under this Court's decision in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), any district court would have had jurisdiction over a habeas claim on behalf of aliens detained in the course of armed hostilities in a foreign country and held outside the sovereign territory of the United States. Neither of these questions, however, is properly presented by this petition. The court of appeals did not decide either issue, holding that it was both unnecessary and improper to reach them in light of the petitioners' obvious lack of standing to sue on the detainees' behalf. Indeed, the court of appeals expressly vacated the portions of the district court's decision addressing those questions. Pet. App. 20-21.

This Court should not reach out to decide the rights of detainees who are not present before the Court and to review a district court ruling that the Ninth Circuit has vacated. Generally, this Court "do[es] not decide in the first instance issues not decided below." *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999); accord *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976). Here, not only did the court of appeals decline to resolve the second and third questions raised in the petition, it *vacated* the portions of the district court opinion addressing those questions, correctly concluding that it would be improper to resolve questions

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for writ of habeas corpus, with an additional allegation that they recently have on one occasion attempted to contact the detainees by letter. See Pet. for Habeas Corpus, *Coalition of Clergy* v. *Bush*, No. 02-9516 (C.D. Cal. filed Dec. 16, 2002).

concerning the rights of the detainees in a case where the claimed next friends lack standing because they have no relationship whatsoever to the detainees. If the Court were inclined to address the sole issue addressed by the Ninth Circuit, the normal course would be to address that issue alone and if it disagreed with the disposition below remand for the court of appeals to address the alternative grounds. Those principles apply with particular force in light of the sensitive constitutional and foreign policy issues implicated by the second and, in particular, third questions presented. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 660-661, 668 (1981).

b. Review of petitioners' second and third questions presented is also unwarranted because the district court's now-vacated ruling was correct on the merits and consistent with the other courts to address this issue directly. The district court correctly held that it lacked jurisdiction to consider the habeas petition because none of the named custodians was within the territorial jurisdiction of the Central District of California. Pet. App. 46-49. Because a writ of habeas corpus acts "upon the person who holds [the detainee] in what is alleged to be unlawful custody," *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484, 494-495 (1973), a district court lacks jurisdiction to issue the writ unless the detainee's custodian is present within the court's territorial jurisdiction. See *Schlanger* v. *Seamans*, 401 U.S. 487, 491 (1971) ("absence of his custodian is fatal to * * * jurisdiction"); accord *Dunne* v. *Henman*, 875 F.2d 244, 248 (9th Cir. 1989); *Vasquez* v. *Reno*, 233 F.3d 688, 693 (1st Cir. 2000), cert. denied, 534 U.S. 816 (2001); but cf. *Henderson* v. *INS*, 157 F.3d 106, 125-127 (2d Cir. 1998) (reserving judgment as to whether Attorney General might be proper custodian in immigration case

filed in New York), cert. denied, 526 U.S. 1004 (1999). This is true even if the custodians are government officials who are likely to have "minimum contacts" with the jurisdiction and who are subject to nationwide service of process under 28 U.S.C. 1391(e). See *Schlanger*, 401 U.S. at 488-489, 490 n.4, 491 (no jurisdiction over Secretary of the Navy).[6]

The district court also properly concluded that *Eisentrager* bars any attempt to secure habeas relief for the detainees petitioners purport to represent. Pet. App. 50-54. This Court in *Eisentrager* declined to exercise jurisdiction over a habeas petition filed by German nationals who had been seized by United States armed forces in China after the German surrender in World War II and subsequently imprisoned in a United States military prison in Landsberg, Germany. See 339 U.S. at 765-767. The Court held that the prisoners could not file a petition for habeas corpus in any court of the United States because they were aliens without connection to the United States who had been seized and at all times held outside the sovereign territory of the United States. The Court emphasized that aliens have been accorded rights under the Constitution and laws of the United States only as a consequence of their presence within the United States. As the Court put it, "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial juris-

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[6] *Braden*, relied on by petitioners, held that a *detainee* need not be present in the district in which he files his habeas petition, but it did not alter the requirement that the *custodian* be physically present. 410 U.S. at 500. *Ex parte Hayes*, 414 U.S. 1327 (1973) (Douglas, J., in chambers), did not decide whether jurisdiction would be proper, *id.* at 1329, and is not a holding of the Court.

diction that gave the Judiciary power to act." *Id.* at 771. Accordingly, the Court held that the writ of habeas corpus was unavailable because "these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." *Id.* at 778. The Court also held that the prisoners could not invoke the writ to vindicate the Fifth Amendment, because, as aliens abroad, they had no Fifth Amendment rights. See *id.* at 781-785.

Like the prisoners in *Eisentrager*, the detainees in this case are aliens who were seized abroad during military hostilities and are held at a location, the Guantanamo Bay Naval Base, outside the sovereign territory of the United States. See Lease Agreement, art. III (recognizing "ultimate sovereignty of the Republic of Cuba" over Guantanamo); Pet. App. 55-58; cf. *United States* v. *Spelar*, 338 U.S. 217, 219, 221-222 (1949) (distinguishing between "possessions" and "sovereignty," and recognizing that leased military base in Newfoundland was in "foreign country" and "subject to the sovereignty of another nation" rather than the United States). Under *Eisentrager*, such aliens held abroad do not enjoy "the privilege of litigation" in United States courts. 339 U.S. at 777; see Pet. App. 51-53.[7]

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[7] Petitioners falsely suggest that the government has interpreted the Lease Agreement to give it sovereignty over Guantanamo. The only source for this assertion is a privately-written history that was briefly posted on the Guantanamo Bay web site with the express caveat that "[i]t is in no way endorsed, certified as fact, or otherwise presented as 'official documentation' of events and historical policy at Guantanamo Bay by the United States

Not only was the district court's application of *Eisentrager* correct, it is entirely consistent with the United States Court of Appeals for the District of Columbia Circuit's recent conclusion in a group of cases raising virtually identical claims brought by family members of Guantanamo detainees. See *Al Odah* v. *United States*, 321 F.3d 1134, 1137-1144 (D.C. Cir. 2003), aff'g *sub nom. Rasul* v. *Bush*, 215 F. Supp. 2d 55, 57-58 (D.D.C. 2002) (opinion of Kollar-Kotelly, J.) (reaching same conclusion). Like the district court in this case, the D.C. Circuit in *Al Odah* concluded that "the Guantanamo detainees have much in common with the German prisoners in *Eisentrager*. They too are aliens, they too were captured during military operations, they too were in a foreign country when captured, they are now abroad, they are in the custody of the American military, and they have never had any presence in the United States." 321 F.3d at 1140. As like the district court below, the D.C. Circuit rejected the argument that the United States has de facto sovereignty over Guantanamo, *id.* at 1141-1142, as well as petitioners' other arguments for evading the plain meaning of *Eisentrager*, see *id.* at 1138-1144; *id.* at 1145-1150 (Randolph, J., concurring) (rejecting various international law claims).[8]

Government or its agencies." See *A Note from the Public Affairs Office* (last modified Mar. 26, 2003) <www.nsgtmo.navy.mil/history.htm>.

[8] Although the court of appeals in this case vacated the portion of the district court's order addressing *Eisentrager* because of petitioners' lack of standing, it expressed no disagreement with the merits of the district court's conclusion that *Eisentrager* precludes jurisdiction over habeas claims brought on behalf of aliens detained at Guantanamo. To the contrary, the Ninth Circuit emphasized that "[t]here is *no question* that the holding in [*Eisentrager*] repre-

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CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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sents a *formidable obstacle* to the rights of the detainees at [Guantanamo] to the writ of habeas corpus." Pet. App. 20 n.4 (emphasis added). The court of appeals further stated that it was "impossible to ignore" *Eisentrager*'s jurisdictional bar because that case "well matches the extraordinary circumstances here." *Ibid.*